TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 590.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE ERIE RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED JULY 27, 1914.

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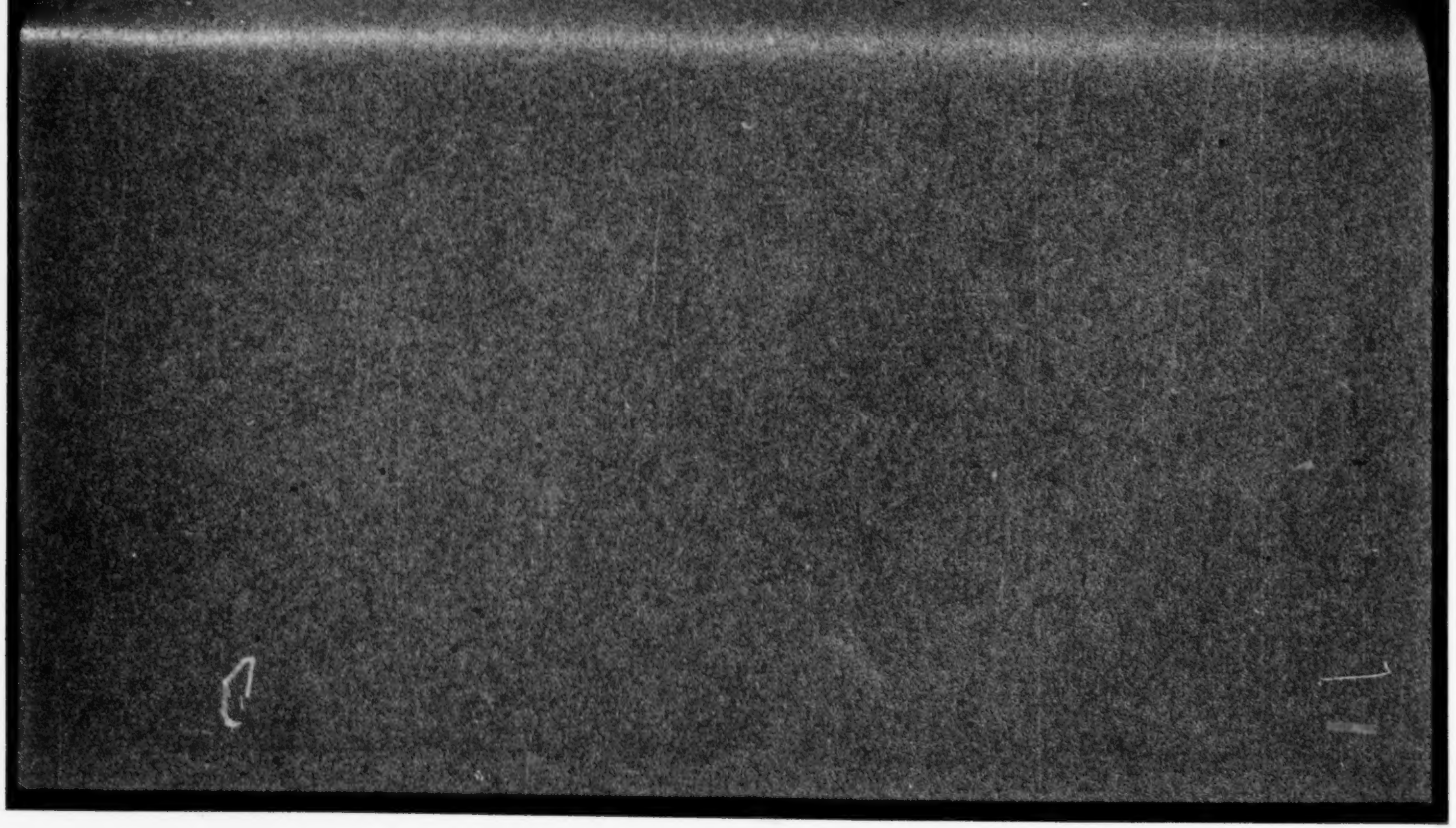

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A Transcript of Record. United States Circuit Court of Appeals, Third Judicial Circuit. The United States of America, Plaintiff in error, vs. Erie Railroad Company, defendant in error. In error to the District Court of the United States for the district of New Jersey. John B. Vreeland, United States district attorney, attorney of plaintiff in error. Collins & Corbin, attorneys of defendant in error.

1 United States District Court, District of New Jersey.

THE UNITED STATES
vs.
ERIE RAILROAD COMPANY. } On contract.

Docket entries.

June 15, 1911. Summons with declaration issued, returnable July 3/11.
" 20, " Summons returned, served.
July 1, " Plea.
" 22, " Notice of trial.
Oct. 31, " Trial verdict for plaintiff against defendant, $2,600.00.
" " " Marshal's affidavit.
Nov. 15, " " costs.
" " " Final judgment, $2,600.00.
" " " Judgment entered, $2,600.00.
" " " Taxed costs, $32.35.
Dec. 13, " Bill of exceptions.
" " " Assignment of errors.
" " " Petition for writ of error.
" " " Order allowing writ of error.
" " " Writ of error, returnable Jan. 12/12.
" " " Citation issued, returnable Jan. 12/12.
" " " Stipulation for bond.
Dec. 13, 1911. Bond on writ of error.
2 June 18, 1911. Citation returned, service acknowledged.
July 25, 1912. Mandate of U. S. Circuit Court of Appeals reversing judgment of this court, filed.
Aug. 2, 1912. Motion for new trial and order of allowance filed.
" 21, " Notice of trial filed.
Sept. 20, " Continued for the term.
Dec. 16, " Notice of trial filed.
Feb. 18, 1913. Trial.
" 19, " Trial. Verdict, "Not guilty."
Mar. 29, " Rule for judgment final for defendant, filed.
" " " Bill of exceptions filed.

Apr. 7, 1913. Assignments of error filed.
" " " Petition for writ of error filed.
" " " Order allowing writ of error filed.
" " " Writ of error issued. Copy filed.
" " " Citation issued.
" 12, " Citation returned, service acknowledged. Copy filed.
May 5, " Order extending time to file transcript. Copy filed.

3 In the District Court of the United States, District of New Jersey.

THE UNITED STATES OF AMERICA
vs.
ERIE RAILROAD COMPANY.

Summons.

(Filed June 20, 1911.)

UNITED STATES OF AMERICA,
District of New Jersey.

The President of the United States of America to the marshal of the District of New Jersey, greeting:

You are hereby commanded to summon Erie Railroad Company (a corporation) if it shall be found in your district, to be and appear before the District Court of the United States for the District of New Jersey, to be held at Trenton, in and for said district, on the third day of July, A. D. 1911, to answer unto the United States of America, in an action upon contract wherein the plaintiff demands the sum of twenty-six hundred dollars, and have you then and there this writ.

Witness, honorable Joseph Cross, judge of said court and the
4 seal thereof, at Trenton aforesaid, the fifteenth day of June, A. D. one thousand nine hundred and eleven.

[SEAL.] GEORGE T. CRAMER, *Clerk.*
By BENJAMIN F. HAVENS, *Deputy.*

JOHN B. VREELAND,
United States Attorney.

Served the within summons and declaration on the defendant, Erie Railroad Co., by delivery to and leaving with H. C. Dolson, reg. agt., office of the chief clerk personally at Jersey City, in the district of New Jersey, on the 19th day of June, A. D. 1911, and at the same time informing said person of its contents.

THOMAS J. ALCOTT,
United States Marshal.

Declaration.

(Filed June 20, 1911.)

Of the third day of July, one thousand nine hundred and eleven.

UNITED STATES OF AMERICA,
District of New Jersey, ss:

The Erie Railroad Company, a corporation organized and doing business under the laws of the State of New York, and having an office and place of business at Jersey City, within the State of New Jersey, defendant, having been summoned at the suit of the United States of America in an action upon contract wherein the said
5 plaintiff demands of the said defendant to render unto the said plaintiff the sum of twenty-six hundred dollars, which the said defendant owes to the said plaintiff and unjustly detains from it, thereupon the said plaintiff, by John B. Vreeland, United States attorney for the district of New Jersey, its attorney, complains, for that, whereas, heretofore, to wit, on the seventeenth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid, in said district, hauled and permitted to be hauled a certain car, to wit, a refrigerator car known and designated as "C. B. T. Co. 1442," upon its said railroad, said car, to wit, refrigerator car aforesaid, being then and there used as part of a train engaged in the movement of interstate commerce, to wit, said train then and there included a certain other car known and designated as "Erie 73105," and containing scrap iron consigned from Long Dock, Harlem, New York, to Ramapo, New York, via Jersey City, in said State of New Jersey, which said car, to wit, refrigerator car aforesaid, was not then and there part of a train composed of four-wheel cars or train composed of eight-wheel standard logging cars, having
6 a height from top of rail to center of coupler not exceeding twenty-five inches, nor used exclusively for the transportation of logs nor used upon the street railways; that said car, to wit, refrigerator car aforesaid, so used as aforesaid, was then and there equipped on the "B" end thereof with a coupler of such faulty and inoperative condition, to wit, the top clevis and one link were missing from the uncoupling chain and the lever was inoperative, by reason whereof said car, to wit, refrigerator car aforesaid, could not be

coupled at the "B" end thereof by impact, and could not be uncoupled without the necessity of men going between the "B" end of said car, to wit, refrigerator car aforesaid, and the end of such car as might be thereto coupled; thereby violating the statute in such case made and provided, known as the "Safety appliance act," entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; twenty-seven United States Statutes at Large, page five hundred and thirty-one as amended April first, eighteen hundred and ninety-six, twenty-nine United States Statutes at Large, page eighty-five, and as further amended March second, one thousand nine hundred and three, thirty-two United States Statutes at Large, page nine hundred and forty-three, and thereby becoming liable to the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned.

Wherefore, the said plaintiff avers that by virtue of the aforesaid statutes and the amendments, and the violation thereof, there is due and owing from the said defendant to the said plaintiff the said sum of one hundred dollars, part and parcel of the sum first above named.

7 And for that, where as, also, afterwards, to wit, on the nineteenth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, in said district, hauled and permitted to be hauled a certain car, to wit, a box car known and designated as "Erie 03831," upon its said railroad, said car, to wit, box car aforesaid, being then and there used as part of a train engaged in the movement of interstate commerce, to wit, said train then and there included a certain other car known and designated as "D. L. & W. 38125," and containing barrels consigned from Twenty-eighth Street, New York, to Weehawken, in the State of New Jersey, which said car, to wit, box car aforesaid, was not part of a train composed of four-wheel cars, or train composed of eight-wheel standard logging cars, having a height from top of rail to center of coupler not exceeding twenty-five inches nor used exclusively for the transportation of logs nor used upon the street railways; that said car, to wit, box car aforesaid, so used as aforesaid, was then and there equipped on the "A"

and "B" ends thereof with couplers of such faulty and inoperative condition, to wit, the lock block was missing and guard arm
8 broken on the "B" end thereof and the top clevis pin was missing, and part of the uncoupling chain broken on the "A" end thereof, by reason whereof said car, to wit, box car aforesaid, could not be coupled at either the "A" or "B" end thereof by impact, and could not be uncoupled at said "A" and "B" ends without the necessity of men going between such end of said car, to wit, box car aforesaid, and the end of such car as might be thereto coupled; thereby violating the statute in such case made and provided, known as the "Safety appliance act," entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; twenty-seven United States Statutes at Large, page five hundred and thirty-one, as amended April first, eighteen hundred and ninety-six, twenty-nine United States Statutes at Large, page eighty-five, and as further amended March second, one thousand nine hundred and three, thirty-two United States Statutes at Large, page nine hundred and forty-three, and thereby becoming liable to the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned.

Wherefore, the said plaintiff avers that by virtue of the aforesaid statutes and the amendments, and the violation thereof, there is due and owing from the said defendant to the said plaintiff the said sum of one hundred dollars, part and parcel of the sum first above named.

And for that, whereas, also, afterwards, to wit, on the nineteenth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said
9 defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad, to and from points in said State of New Jersey, along said line of railroad, to and from points in the several States and Territories of the United States; that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid, in said district, hauled and permitted to be hauled a certain other car, to wit, a box car known and designated as "Erie 106812," upon its said railroad, said car, to wit, box car aforesaid, being then and there used as part of a train engaged in the movement of interstate commerce, to wit, said train then and there included a certain other car known and designated as "D. L. & W. 38125," and containing barrels consigned from Twenty-eighth Street, New York, to Weehawken, in the State of New Jersey, which said car, to wit, box car aforesaid, was not part of a train composed of four-wheeled cars or train composed of eight-wheel standard logging cars, having a height from

top of rail to center of coupler not exceeding twenty-five inches nor used exclusively for the transportation of logs, nor used upon the street railways; that said car, to wit, box car aforesaid, so used as aforesaid, was then and there equipped on the "B" end thereof with a coupler of such faulty and inoperative condition, to wit, the lock block was broken, the bottom part of the block remaining in the coupler, and the lever was inoperative, by reason whereof said car, to wit, box car aforesaid, could not be coupled at the "B" end thereof by impact, and could not be uncoupled without the necessity
10 of men going between the "B" end of said car, to wit, box car aforesaid, and the end of such car as might be thereto coupled; thereby violating the statute in such case made and provided, known as the "Safety appliance act," entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; twenty-seven United States Statutes at Large, page five hundred and thirty-one, as amended April first, eighteen hundred and nienty-six, twenty-nine United States Statutes at Large, page eighty-five, and as further amended March second, one thousand nine hundred and three, thirty-two United States Statutes at Large, page nine hundred and forty-three, and thereby becoming liable to the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned.

Wherefore, the said plaintiff avers that by virtue of the aforesaid statutes and the amendments, and the violation thereof, there is due and owing from the said defendant to the said plaintiff the said sum of one hundred dollars, part and parcel of the sum first above mentioned.

For that, whereas, also, afterwards, to wit, on the twenty-fourth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of
11 railroad to and from points in said State of New Jersey along said line of railroad to and from points in the several States and Territories of the United States; that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid in said district, hauled and permitted to be hauled a certain other car, to wit, a box car known and designated as "Erie 69662" upon its said railroad, said car, to wit, box car aforesaid, being then and there used as part of a train engaged in the movement of interstate commerce, to wit, said train then and there included a certain other car known and designated as "Erie 74549," and containing scrap iron consigned from Weehawken, New Jersey, to Meadville, in the

State of Pennsylvania, which said car, to wit, box car aforesaid, was not part of a train composed of four-wheel cars or train composed of eight-wheel standard logging cars, having a height from top of rail to center of coupler not exceeding twenty-five inches nor used exclusively for the transportation of logs nor used upon the street railways; that said car, to wit, box car aforesaid, so used as aforesaid, was then and there equipped on the "B" end thereof, with a coupler of such faulty and inoperative condition, to wit, the knuckle was missing and said car was chained to a certain other car, to wit, Erie car No. 29478, by reason whereof said car, to wit, box car aforesaid, could not be coupled at the "B" end thereof by impact, and could not be uncoupled without the necessity of men going between the "B" end of said car, to wit, box car aforesaid, and the end of such car as might be thereto coupled; thereby violating the statute in such case made and provided, known as the "Safety appliance act," entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in
12 interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; twenty-seven United States Statutes at Large, page five hundred and thirty-one, as amended April first, eighteen hundred and ninety-six, twenty-nine United States Statutes at Large, page eighty-five, and as further amended March second, one thousand nine hundred and three, thirty-two United States Statutes at Large, page nine hundred and forty-three, and thereby becoming liable to the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned.

Wherefore, the said plaintiff avers that by virtue of the aforesaid statutes and the amendments, and the violation thereof, there is due and owing from the said defendant to the said plaintiff the said sum of one hundred dollars, part and parcel of the sum first above named.

For that, whereas, also, afterwards, to wit, on the twenty-fourth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over and across, to wit, the States of New York and New Jersey and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey along said line of railroad to and from points in the several States and Territories of the United States; that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid, in said district, hauled and permitted to be hauled a certain other car, to wit, a gon-
13 dola car known and designated as "Erie 29478," upon its said railroad, said car, to wit, gondola car aforesaid, being then and there used as a part of a train engaged in the movement of interstate commerce, to wit, said train then and there included a cer-

tain other car known and designated as "Erie 74549," and containing scrap iron consigned from Weehawken, New Jersey, to Meadville, in the State of Pennsylvania, which said car, to wit, gondola car aforesaid, was not part of a train composed of four-wheel cars or train composed of eight-wheel standard logging cars, having a height from top of rail to center of coupler not exceeding twenty-five inches nor used exclusively for the transportation of logs nor used upon the street railways; that said car, to wit, gondola car aforesaid, so used as aforesaid, was then and there equipped on the "B" end thereof with a coupler of such faulty and inoperative condition, to wit, the guard arm was broken and said car, to wit, gondola car aforesaid, was chained to a certain other car, to wit, Erie car No. 69662, by reason whereof said car, to wit, gondola car aforesaid, could not be coupled at the "B" end thereof by impact, and could not be uncoupled without the necessity of men going between the "B" end of said car, to wit, gondola car aforesaid, and the end of such car as might be thereto coupled; thereby violating the statute in such case made and provided, known as the "Safety appliance act," entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, twenty-seven United States Statutes at Large, page five hundred and thirty-one, as amended April first, eighteen
14 hundred and ninety-six, twenty-nine United States Statutes at Large, page eighty-five, and as further amended March second, one thousand nine hundred and three, thirty-two United States Statutes at Large, page nine hundred and forty-three, and thereby becoming liable to the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned.

Wherefore, the said plaintiff avers that by virtue of the aforesaid statutes and the amendments, and the violation thereof, there is due and owing from the said defendant to the said plaintiff the said sum of one hundred dollars, part and parcel of the sum first above named.

For that, whereas, also, afterwards, to wit, on the twenty-seventh day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad, to and from points in the several States and Territories of the United States; that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid, in said district, hauled and permitted to be hauled a certain other car, to wit, a refrigerator car known and designated as "Erie 66749," upon its said railroad,

said car to wit, refrigerator car aforesaid, being then and there used as part of a train engaged in the moving of interstate commerce, to wit, said train then and there included a certain other car, to
15 wit, "Ill. Cent. 39947," and containg paper consigned from Twenty-eighth Street, New York, to Bloomfield, in the State of New Jeresey, which said car, to wit, refrigerator car aforesaid, was not part of a train composed of four-wheel cars or train composed of eight-wheel standard logging cars, having a height from top of rail to center of coupler not exceeding twenty-five inches nor used exclusively for the transportation of logs, nor used upon the street railways; that said car, to wit, refrigerator car aforesaid, so used as aforesaid, was then and there equipped on the "B" end thereof with a coupler of such faulty and inoperative condition, to wit, the knuckle was missing and said car was chained to a certain other car, to wit, Erie car No. 101062, by reason whereof said car, to wit, refrigerator car aforesaid, could not be coupled at the "B" end thereof by impact, and could not be uncoupled without the necessity of men going between the "B" end of said car, to wit, refrigerator car aforesaid, and the end of such car as might be thereto coupled; thereby violating the statute in such case made and provided, known as the "Safety-appliance act," entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; twenty-seven United States Statutes at Large, page five hundred and thirty-one as amended April first eighteen hundred and ninety-six, twenty-nine United States Statutes at Large, page eighty-five, and as further amended March second, one thousand nine hundred and three, thirty-two United States Statutes at Large, page nine hundred and forty-three, and thereby becoming liable
16 to the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned.

Wherefore, the said plaintiff avers that by virtue of the aforesaid statutes and the amendments, and the violation thereof, there is due and owing from the said defendant to the said plaintiff the said sum of one hundred dollars, part and parcel of the sum first above named.

For that, whereas, also, afterwards, to wit, on the twenty-seventh day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad, to and from points in the several States and Territories of the United States; that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, in said district, hauled

and permitted to be hauled a certain car, to wit, a box car known and designated as "Erie 101062," upon its said railroad, said car, to wit, box car aforesaid, being then and there used as part of a train engaged in the movement of interstate commerce, to wit, said train then and there included a certain other car known and designated as "Ill. Cent. 39947," and containing paper consigned from Twenty-eighth Street, New York, to Bloomfield, in the State of New Jersey, which said car, to wit, box car aforesaid, was not part of a train composed of four-wheel cars or train composed of eight-wheel standard
17 logging cars, having a height from top of rail to center of coupler not exceeding twenty-five inches nor used exclusively for the transportation of logs nor used upon the street railways; that said car, to wit, box car aforesaid, so used as aforesaid, was then and there equipped on the "A" end thereof with a coupler of such faulty and inoperative condition, to wit, the coupler was missing and said car was then and there chained to a certain other car, to wit, Erie car No. 66749, by reason whereby said car, to wit, box car aforesaid could not be coupled at the "A" end thereof by impact, and could not be uncoupled without the necessity of men going between the "A" end of said car, to wit, box car aforesaid, and the end of such car as might be thereto coupled; thereby violating the statute in such case made and provided, known as the "Safety appliance act," entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; twenty-seven United States Statutes at Large, page five hundred and thirty-one, as amended April first, eighteen hundred and ninety-six, twenty-nine United States Statutes at Large, page eighty-five, and as further amended March second, one thousand nine hundred and three, thirty-two United States Statutes at Large, page nine hundred and forty-three, and thereby becoming liable to the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned.

Wherefore, the said plaintiff avers that by virtue of the aforesaid statutes and the amendments, and the violation thereof, there is due and owing from the said defendant to the said plaintiff the
18 said sum of one hundred dollars, part and parcel of the sum first above named.

For that, whereas, also, afterwards, to wit, on the twenty-first day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line

of railroad, to and from points in the several States and Territories of the United States; that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City aforesaid, in said district, hauled and permitted to be hauled a certain car, to wit, a box car known and designated as "Grand Trunk 11049," upon its said railroad, said car, to wit, box car aforesaid, being then and there used as part of a train engaged in the movement of interstate commerce, to wit, said train then and there included a certain other car known and designated as "Erie 100345," and containing waste paper consigned from Duane Street, New York City, to Whippany, in the State of New Jersey, which said car, to wit, box car aforesaid, was not part of a train composed of four-wheel cars or train composed of eight-wheel standard logging cars, having a height from top of rail to center of coupler not exceeding twenty-five inches nor used exclusivelly for the transportation of logs, nor used upon the street railways; that said car, to wit, box car aforesaid, so used as aforesaid, was not then and there provided on the "B" end thereof with secure grab irons or hand-holds over
19 the sill step for the greater security of men in coupling and uncoupling such cars as might be coupled with said box car, aforesaid, at the "B" end thereof, or uncoupled therefrom, and the same were wholly missing; thereby violating the statute in such case made and provided known as the "Safety appliance act," entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three; twenty-seven United States Statutes at Large, page five hundred and thirty-one, as amended April first, eighteen hundred and ninety-six, twenty-nine United States Statutes at Large, page eighty-five, and as further amended March second, one thousand nine hundred and three, thirty-two United States Statutes at Large, page nine hundred and forty-three, and thereby becoming liable to the said plantiff in the sum of one hundred dollars, the penalty therein mentioned.

Wherefore, the said plaintiff avers that by virtue of the aforesaid statutes and the amendments, and the violation thereof, there is still due and owing from the said defendant to the said plaintiff the sum of one hundred dollars, part and parcel of the sum first above named.

For that, whereas, also, afterwards, to wit, on the seventeenth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the
20 transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along

said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad in the movement of interstate traffic, to comply with the act of Congress known as the "Safety appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five-hundred and thirty-one), as amended by an act approved April first, one thousand eight hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made, pursuant to said statute as amended, under date of March second, one thousand nine hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, that on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

21 And the plaintiff alleges that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City aforesaid, westward in the direction of Bergen in said State, a train, to wit, its own transfer train consisting of thirty-two cars drawn by locomotive engine known and designated as "Erie No. 72," said train being then and there operated with train or power brakes and used, and then and there engaged, in the movement of interstate traffic, that is to say, one of said thirty-two cars known and designated as "Erie 73105" contained scrap iron consigned from Long Dock, Harlem, in the State of New York, to Ramapo, in the State of New York, via Jersey City, aforesaid.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid, none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Whereof, the plaintiff alleges that by reason of the said violation of the said act of Congress as aforesaid, said defendant is liable to

the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the nineteenth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defend-
22 ant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it become the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, that on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated
23 by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, in said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City westward in the direction of Bergen, in said State, a train, to wit, its own transfer train, consisting of twenty-seven cars drawn by locomotive engine known and designated as "Erie No. 56," said train being then and there operated with train or power brakes and used, and then and there engaged, in the movement of interstate traffic, that is to say, one of said twenty-seven cars known and designated as "D., L. & W. 38125," contained empty barrels consigned from Twenty-eighth Street, New York City, in the State of New York, to Weehawken, in the State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid, none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable
24 to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that, whereas, also, afterwards, to wit, on the twentieth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety appliance act," approved March second, eighteen hundred and ninety-three (twenty seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

25 "It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in

said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City, aforesaid, westward in the direction of Bergen, in said State, a train, to wit, its own transfer train, consisting of thirty-three cars drawn by locomotive engine known and designated as "Erie No. 71," said train being then and there operated with train or power brakes, and used, and then and there engaged, in the movement of interstate traffic, that is to say, one of said thirty-three cars known and designated as Erie box car No. 104122, contained paper stock consigned from Palmer Dock, Brooklyn, in the State of New York, to Whippany, in the State of New Jersey, via Jersey City aforesaid;

And plaintiff further alleges that at the time the defendant operated said train as aforesaid, none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the crew which composed said train had their brakes used and operated or so assembled and con-
26 nected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid;

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the said plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-first day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven States at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train
27 brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three,

which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City, aforesaid, westward in the direction of Bergen, in said State, a train, to wit, its own transfer train consisting of twenty-four cars drawn by locomotive engine known and designed as "Erie No. 71," said train being then and there operated with train or power brakes and used, and then and there engaged, in the movement of interstate traffic; that is to say, one of said twenty-four cars known and designated as Erie box car No. 100345, contained thirty-four bales of waste paper consigned from New York City to Whippany, in the State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid none of the cars in said train had
28 its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated, or so assembled and connected, that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that, whereas, also, afterwards, to wit, on the twenty-third day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March

second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by
29 an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City, aforesaid, westward in the direction of Bergen, in said State, a train, to wit, its own transfer train consisting of twenty-one cars drawn by locomotive engine known and designated as "Erie No. 55," said train being then and there operated with train or power brakes and used, and then and there engaged in the movement of interstate traffic; that is to say, one of said twenty-one cars known and designated as N. O. & N. E. Box 16262, contained empty barrels consigned from Brooklyn,
30 in the State of New York, to Edgewater, in the State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-fourth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said de-

fendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad, to and from points in the several States and Territories of the United States, and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Con-
31 gress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power on train brakes on such trains, as contained in an order of said Interstate Commerce Commision, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Weehawken, aforesaid, westwards in the direction of Bergen, in said State, a train, to wit, its own transfer train consisting of thirty-one cars drawn by locomotive engine known and designated as "Erie No. 71," said train being then and
32 there operated with train or power brakes and used, and then and there engaged in the movement of interstate traffic; that is to say, one of said thirty-one cars known and designated as "Erie 74549" contained scrap iron, consigned from Weehawken, in the State of New Jersey, to Meadville, in the State of Pennsylvania.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid none of the cars in said train had its brakes used and operated by the engineers and persons in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated, or so assembled and connected

that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that, whereas, also, afterwards, to wit, on the twenty-fourth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad, to and from points in the several States and Territories of the United States; and thereupon it became the
33 duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, that on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated
34 on its line of railroad from Bergen, State of New Jersey, eastward to Weehawken, in said State of New Jersey, a train, to wit, its own transfer train consisting of thirty-one cars drawn by locomotive engine known and designated as "Erie No. 71," said train being then and there operated with train or power brakes and used, and then and there engaged in the movement of interstate traffic;

that is to say, one of said thirty-one cars, known and designated as "Erie Gondola 42092," contained coal consigned from Scranton, in the State of Pennsylvania, to Weehawken, in the State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid but eleven of the cars in said train had their brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated, or so assembled and connected, that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-fifth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad, to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress, known as the "safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statute at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

35

"It is ordered, that on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

36 And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Weehawken, in the State of New Jersey, westward toward Bergen, in said State of New Jersey, a train, to wit, its own transfer train, consisting of thirty-one cars drawn by locomotive engine known and designated as "Erie No. 71," said train being then and there operated with train or power brakes, and used, and then and there engaged in the movement of interstate traffic; that is to say, one of said thirty-one cars known and designated as "L. S. & M. S. box, empty," consigned from Weehawken, in the State of New Jersey, to Buffalo, in the State of New York, was then and there being moved as a part of said train.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated, or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-sixth day of January, one thousand nine hundred and eleven, to wit,

37 at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad, to and from points in said State of New Jersey along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and

three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of
38 the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Bergen, in the State of New Jersey, eastward toward Jersey City, in the State of New Jersey, its own transfer train consisting of twenty-five cars drawn by locomotive engine known and designated as "Erie No. 72," said train being then and there operated with train or power brakes, and used, and then and there engaged, in the movement of interstate traffic; that is to say, one of said twenty-five cars known and designated as "M. C. box 41521," contained oats consigned from Chicago, in the State of Illinois, to Jersey City, in the State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid but twelve of the cars in said train had their brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated, or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is
39 liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-sixth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad, to and from points in said State of New Jersey along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the

movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

40 "It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such trains shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Bergen, in the State of New Jersey, eastward toward Weehawken, in the State of New Jersey, its own transfer train consisting of thirty cars drawn by locomotive engine known and designated as "Erie No. 71," said train being then and there operated with train of power brakes, and used, and then and there engaged in the movement of interstate traffic; that is to say, one of said thirty cars known and designated as "Erie box 711113," contained oil consigned from Rochester, in the State of New York, to Long Dock, in the said State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid, but fourteen of the cars in said train had their brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer

41 and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-seventh day of January, one thousand nine hundred and eleven, to wit, at

Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Inter-
42 state Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Bergen, in the State of New Jersey, eastward toward Weehawken, in the said State of New Jersey, its own transfer train consisting of twenty-seven cars drawn by locomotive engine known and designated as "Erie No. 71," said train being then and there operated with train or power brakes, and used, and then and there engaged, in the movement of interstate commerce, that is to say, one of said twenty-seven cars known and designated as "Erie box 80606," contained oil consigned from Rochester, in the State of New York, to Long Dock, in the city of Jersey City, and State of New Jersey.

And plaintiff further alleges that at the time the defendant oper-
operated said train as aforesaid but twelve of the cars in said
43 train had their brakes used and operated by the engineer and person in charge of said locomotive then and there drawing

said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-seventh day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine
44 Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City westward to Bergen, in the said State of New Jersey, its own transfer train consisting of twenty-four cars drawn by locomotive engine known and designated as "Erie

No. 71," said train being then and there operated with train or power brakes, and used and then and there engaged in the movement of interstate commerce; that is to say, one of said twenty-four cars known and designated as "I. C. Box 39947," contained paper
45 consigned from Twenty-eighth Street, New York, to Bloomfield, in the State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train as aforesaid, and less than eighty-five per cent. of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-eighth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety appliance act," approved March
46 second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act provided April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission, made pursuant to said statute, as amended under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent. of the cars of such train shall have their brakes used and operated by the en-

gineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent. shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City, aforesaid, westward to Bergen, in the said State of New Jersey, its own transfer train consisting of seventeen cars drawn by locomotive engine known and designated as "Erie No. 56," said train being then and there operated
47 with train or power brakes, and used, and then and there engaged, in the movement of interstate commerce; that is to say, one of said seventeen cars known and designated as "Erie box 102152" contained empty crates consigned from Long Dock, in the said city of Jersey City, to Chester, in the State of New York.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid, none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent. of the cars which composed said train had their brakes and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the twenty-eighth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to, and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of
48 said defendant, in operating railroad trains upon its said line of railroad, in the movement of interstate traffic, to comply with the act of Congress known as the "Safety appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained

in an order of said Interstate Commerce Commission, made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent. of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent. shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, in said district and within the jurisdiction of this court, operated on its line of railroad from Bergen, in the State of New Jersey,
49 eastward to Weehawken, in said State of New Jersey, its own transfer train consisting of twenty-eight cars drawn by locomotive engine known and designated as "Erie No. 73," said train being then and there operated with train or power brakes, and used, and then and there engaged, in the movement of interstate commerce, that is to say, one of said seventeen cars known and designated as "Erie 44490" contained coal consigned from Dunmore, in the State of Pennsylvania, to Weehawken, in the State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid, none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the thirtieth day of January, one thousand nine hundred and eleven, to wit, at Jersey City in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the trans-
50 portation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of

said defendant in operating railroad trains upon its said line of railroad in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission made pursuant to said statute as amended under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

51 And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City, aforesaid, westward to Bergen, in said State of New Jersey, its own transfer train consisting of twenty-five cars drawn by locomotive engine known and designated as "Erie No. 56," said train being then and there operated with train or power brakes, and used, and then and there engaged in the movement of interstate commerce; that is to say, one of said twenty-five cars known and designated as "Erie box 103059" contained empty barrels, consigned from Palmer Dock, in the city of Brooklyn, State of New York, to Edgemont in the said State of New Jersey.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid, none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the thirtieth day of January, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said
52 defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant in operating railroad trains upon its said line of railroad in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety-appliance act, as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the
53 engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Bergen, in the State of New Jersey, eastward to Weehawken, in said State of New Jersey, its own transfer train consisting of twenty-seven cars drawn by locomotive engine known and designated as "Erie No. 56," said train being then and there operated with train or power brakes, and used, and then and there engaged, in the movement of interstate commerce; that is to say, one of said twenty-seven cars known and designated as "L. S. & M. S. 27807" contained machinery consigned from Columbus, in the State of Ohio, to Long Dock, in the city of Jersey City, aforesaid.

And plaintiff further alleges that at the time the defendant operated said train as aforesaid none of the cars in said train had its brakes used and operated by the engineer and person in charge of

said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is
54 liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the first day of February, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant in operating railroad trains upon its said line of railroad in the movement of interstate traffic, to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Commission made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, that on and after September 1, 1910, on all
55 railroads used in interstate commerce, whenever, as required by the safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Bergen, in the State of New Jersey, east-

ward to Weehawken, in said State of New Jersey, its own transfer train consisting of thirty cars drawn by locomotive engine known and designated as "Erie No. 57," said train being then and there operated with train or power brakes, and used, and then and there engaged, in the movement of interstate commerce, that is to say, one of said thirty cars, known and designated as "P. M. box 8079," contained two hundred sacks of flour consigned from Milwaukee, in the State of Wisconsin, to Long Dock, in the city of Jersey City, aforesaid.

And the plaintiff further alleges that at the time the defendant operated said train as aforesaid none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and
56 person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

For that whereas, also, afterwards, to wit, on the first day of February, one thousand nine hundred and eleven, to wit, at Jersey City, in the county of Hudson, in said district, the said defendant owned and operated a line of railroad extending through, over, and across, to wit, the States of New York and New Jersey, and was engaged in interstate commerce as a common carrier among the several States and Territories of the United States, particularly in the transportation of persons and property over said line of railroad to and from points in said State of New Jersey, along said line of railroad to and from points in the several States and Territories of the United States; and thereupon it became the duty of said defendant in operating railroad trains upon its said line of railroad in the movement of interstate traffic to comply with the act of Congress known as the "Safety-appliance act," approved March second, eighteen hundred and ninety-three (twenty-seven Statutes at Large, page five hundred and thirty-one), as amended by an act approved April first, eighteen hundred and ninety-six (twenty-nine Statutes at Large, page eighty-five), as amended by an act approved March second, nineteen hundred and three (thirty-two Statutes at Large, page nine hundred and forty-three), and with the requirements of the Interstate Commerce Commission relating to power or train brakes on such trains, as contained in an order of said Interstate Commerce Com-
57 mission made pursuant to said statute as amended, under date of March second, nineteen hundred and three, which said order, of which the said defendant then and there had notice, is in words and figures following, to wit:

"It is ordered, That on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the

safety-appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-braked cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated."

And the plaintiff alleges that the said defendant, to wit, on the day and year last aforesaid, to wit, at Jersey City, aforesaid, and in said district and within the jurisdiction of this court, operated on its line of railroad from Jersey City, aforesaid, westward to Bergen, in said State of New Jersey, its own transfer train consisting of seventeen cars drawn by locomotive engine known and designated as "Erie No. 71," said train being then and there operated with train or power brakes, and used and then and there engaged in the movement of interstate commerce; that is to say, one of said seventeen cars known and designated as "Erie box 61471" contained empty barrels, consigned from Jersey City, aforesaid, to Lima, in the State of New York.

And the plaintiff further alleges that at the time the defendant operated said train as aforesaid none of the cars in said train had its brakes used and operated by the engineer and person in charge of said locomotive then and there drawing said train, as
58 aforesaid, and less than eighty-five per cent of the cars which composed said train had their brakes used and operated or so assembled and connected that they could be used and operated by the engineer and person in charge of said locomotive engine drawing said train, as aforesaid.

Wherefore, the plaintiff alleges that by reason of the said violation of the said act of Congress, as aforesaid, defendant is liable to the plaintiff in the sum of one hundred dollars, the penalty therein mentioned, part and parcel of the sum first above named.

Wherefore, the plaintiff prays judgment against said defendant in the sum of twenty-six hundred dollars, with costs of suit.

JOHN B. VREELAND,
United States Attorney,
District of New Jersey.

To the within-named defendant:

You are hereby notified that unless you plead or demur to the within declaration within twenty days of the service of the same upon you judgment will be claimed by default in the sum of twenty-six hundred dollars, besides costs of suit.

JOHN B. VREELAND,
United States Attorney,
District of New Jersey.

Endorsed: United States District Court, District of New Jersey. The United States of America *v.* Erie Railroad Company. On contract. Summons and declaration. Summons returnable July 3d,

1911. John B. Vreeland, United States attorney, Morristown, N. J. Filed June 20th, 1911, at 11 o'clock a. m. George T. Cranmer, clerk.

59 *Plea.*

Filed July 1, 1911.

And the said defendant, Erie Railroad Company, by Collins & Corbin, its attorneys, comes and defends the wrong and injury, when, &c., and says that it does not owe the said sums of money above demanded or any part thereof in manner and form as the said plaintiff has above thereof complained against it. And of this the defendant puts itself upon the country.

COLLINS & CORBIN,
Attorneys of Defendant.

60 COUNTY OF NEW YORK,
State of New York, ss:

David Bosman, being duly sworn according to law, says that he is the secretary of the Erie Railroad Company, the defendant named in the foregoing plea; that the said plea is not intended for the purpose of delay and deponent believes that the said defendant has a just and legal defense to the action on the merits of the case.

DAVID BOSMAN.

Sworn and subscribed to at New York City, this 27th day of June, A. D. 1911, before me the subscriber, a foreign commissioner of deeds for New Jersey, in and for said county and State, duly commissioned and sworn, as witness my hand and official seal.

[SEAL.] A. L. TRAVIS,
A Foreign Commissioner of Deeds for New Jersey in New York.

O. K.
G. N. O.
H.

61 United States District Court, District of New Jersey.

UNITED STATES OF AMERICA
vs.
ERIE RAILROAD COMPANY. } Summons issued June 15, 1911.

Rule for judgment final for defendant.

Filed March 29, 1913.

This cause being regularly on the list for trial at the January term, 1913, of this court, and being called, and both parties appearing and the cause being moved by the plaintiff, and a jury empaneled and sworn, and the evidence offered by the parties submitted and the respective parties by their counsel being heard and the court having

directed the jury to find the defendant "not guilty," and the jury having retired to consider their verdict come again into court, and say that the said defendant is not guilty of the premises within laid to its charge, in manner and form as the said plaintiff has within complained against it.

It is thereupon, on this 29th day of March, 1913,

Ordered that judgment final be entered against said plaintiff and in favor of said defendant.

On motion of—

COLLINS & CORBIN,
Defendant's Attorneys.

Let this rule be entered in the minutes of the court.

JOHN RELLSTAB,
Judge.

62 United States District Court, District of New Jersey.

THE UNITED STATES OF AMERICA
vs.
ERIE RAILROAD COMPANY.

Bill of exceptions.

Filed March 29, 1913.

Transcript of shorthand notes of testimony, &c., taken in the above entitled matter, at the trial thereof in the United States District Court for the District of New Jersey, at Trenton, New Jersey, before Hon. Charles P. Orr, United States district judge for the Western District of Pennsylvania, and a jury, at the January, 1913, term of said court.

FIRST DAY.

Tuesday, February 18, 1913.

For the Government appeared United States Attorney John B. Vreeland and Philip J. Doherty, special assistant United States attorney.

For the defendant appeared George S. Hobart, of Collins & Corbin.

Mr. DOHERTY. May it please the court, gentlemen of the jury, this is a prosecution by the Government of the United States, in a civil action, against the Erie Railway Company, involving twenty-six counts. The first eight counts are for liability to the Govern-
63 ment in the way of penalties for defective appliances. You won't be troubled very much about the nature of those defects, because it has been agreed that each of the cars in question was defective in the manner alleged in the plaintiff's petition; and it has

been agreed that the cars involved in those first eight counts were moved and hauled in accordance with the allegations of the plaintiff's petition. There are in the counts from nine to twenty-six, inclusive, charges of violation of the safety appliance laws, in that certain drags of cars—drags of cars from seventeen to thirty-two in number—hauled from Jersey City to Bergen, from Weehawken to Bergen and from Bergen to Weehawken, between those points, while the air hose was not coupled up, so that the engineer could control the speed of the train by the operation of the air brakes. As to those counts the particular questions to which your attention will be directed—it is assumed that, under the direction of the court, your attention will be directed to those points—will be, is the territory including Jersey City, Bergen, and Weehawken all one yard? The Government will contend and introduce evidence before you that at each of those places there is a distinct classification yard, each with its own limits, and that the defendant's hauling of a drag of cars or a possible train from one of those yards to another is a hauling upon the main line of the railroad, which requires the application of the hand brakes. So that the whole question will be, are those terminals one yard, or are they considered separate and distinct yards? Another question to which we think your attention will be directed by the court is that each of those transfer drags was from Weehawken or Jersey City to Bergen—was each one of those a train? And then another question to which your attention will be directed is, was the move-
64 ment of each of those a switching movement or a transfer movement? The Government will contend that each of them was a transfer movement and not a switching movement.

If your honor pleases, in order to facilitate the trial of the case and to save time it has been agreed between the parties as follows:

That the defendant corporation is a railroad engaged in interstate commerce.

That in each of the trains in question there were cars loaded with interstate commerce.

That the cars mentioned in each of the first eight counts were defective, as alleged in plaintiff's declaration, and there is no evidence as to where they became defective. As to these eight counts, the cars mentioned in each count were hauled by the Erie Railroad, over its tracks, as follows: The first three counts from Jersey City to Bergen, N. J., the fourth and fifth from Weehawken to Bergen; and the sixth, seventh, and eighth from Jersey City to Bergen.

That the defective cars mentioned in the fourth and fifth count were chained together, and the defective cars in the sixth and seventh counts were also chained together.

That there is a repair track at Jersey City, where repairs of the nature made necessary to put in order cars in the condition disclosed in five of the counts relating to cars moved from Jersey City (counts one, two, three, six, and eight) could have been made if repair tracks of sufficient capacity were available at Jersey City. The repair track at Jersey City has capacity for seven cars. The repairs necessary

on these five cars are considered light repairs, and these cars were not repaired at Jersey City.

65 That in January, 1911, at Weehawken, this railroad had a force of five men and a foreman to inspect cars and make light repairs.

A repair of the defects mentioned in count four would be a light repair. There were some light repairs made at Weehawken, but there were no tracks distinctly assigned for repairs.

To repair the defect mentioned in count five would take two men about two hours and could be made on any track if it was properly guarded.

As to the alleged air-brake violations, it is agreed that there is at each of the points from which the drags of cars mentioned in these counts (9 to 26 inc.) were hauled, that is, Jersey City, Bergen, and Weehawken—a yard within which the drags were each made up under the direction of the yardmaster of the particular yard.

In the movements called in question of drags of cars in counts of 9 to 26, inclusive, there was no switching or change of makeup of these drags of cars during the transit alleged in plaintiff's declaration; that the distances of each of these hauls is approximated as follows:

Jersey City to Bergen—two miles.

Weehawken to Bergen—three and one-half miles.

The length of the tunnel is seven-eighths of a mile.

There were in the drags mentioned in the declaration as transfer trains:

In count 9------32 cars.
" " 10------27 "
" " 11------33 "
" " 12------24 "
" " 13------21 "
" " 14------31 "
In count 15------31 cars. 11 cars coupled up.

66 " " 16------31 "
" " 17------25 " 12 cars coupled up.

In count 18------30 cars. 14 cars coupled up.
" " 19------27 " " " " " "
" " 20------24 "
" " 21------17 "
" " 22------28 "
" " 23------25 "
" " 24------30 "
" " 25------17 "
" " 26------27 "

That between Jersey City and Bergen there were five switches leading off the tracks used in the movements in question, and between Bergen and Weehawken (eastbound) there were nine, and (westbound) there were six.

There were no cabooses on these trains, and in all of the movements in question brakemen were required to be on the cars, and in some of the cases the brakemen rode on the top of box cars, according to rule 516.

That all these drags of cars during the whole transit exhibited on the rear end of the rear car a green flag and a red light; that is, when the rear car was a box car a green flag was tied at the top of the car to the rung of the ladder at the left-hand side of the rear end of the rear car, and when the rear car was a coal car it was tied to the grab-iron on the rear end of the rear car, and the red lantern was usually displayed on box cars on top of the running board at the centre of the rear end of the rear car, and on coal cars on the projecting end-sill on the rear end of the rear car. There being one such lantern in each case. These flags and lanterns were furnished by the
67 company, and the flags were thus used to indicate to the towerman that the end of the train had passed intact through the tunnel. These towermen are in towers at either end of the tunnel. The red light is for use in emergency.

That there were fifteen important through and local freight trains in each direction in each twenty-four hours entering and leaving Jersey City which use a part of the tracks over which the movements in question here were made.

BERT C. CRAIG sworn in behalf of the Government.

Direct examination by Mr. DOHERTY:

Q. What is your occupation?

A. Inspector of safety appliances for the Interstate Commerce Commission.

Q. How long have you been in the employ of the Interstate Commerce Commission?

A. Nearly eight years.

Q. Before your employment with that commission, what had been your occupation?

A. About fourteen years as a freight and passenger brakeman and yardman for the Erie Railroad.

Q. On or about January 17, 1911, did you make some inspection of cars on the Erie Railroad at one of its yards near Jersey City?

A. I did.

Q. Were you alone or were you with other inspectors?

A. Other inspectors.

Q. How many?

A. Three.

Q. Who were they?

A. Duffy, Brumley, and Gibbon on some of the cars; on others, two, Mr. Brumley and Mr. Gibbon; on others, Mr. Smith, Mr. Gibbon, and Mr. Brumley.

68 Q. Now, directing your attention to the car mentioned in the first count of the plaintiff's petition, refrigerator car,

C. B. Q. car 1442, what was the condition of that car when you saw it?

WITNESS. I would have to refer to my notes.

Mr. DOHERTY. There is no objection to that, I suppose.

Mr. HOBART. No.

A. They had the top clevis and one link of the uncoupling chain missing from the B end.

Q. Was that car made up in connection with other cars at that time—when you first saw it?

A. It was.

Q. How many cars were in that drag of which this car was a part?

A. Thirty-two.

The COURT. Why is it necessary to go into this, when the agreement covers these facts?

Mr. DOHERTY. I was just introducing the question to start in as to the movement.

The COURT. But the agreement covers the defect of the cars, and it covers the movement of the cars, too.

Q. Where was that car when you first saw it?

A. In the Jersey City yard.

Q. Is that a repair point?

A. It is.

Mr. HOBART. That is objected to as asking for a conclusion.

Q. Do you know whether or not the Erie Railroad Company has any facilities for the repair of cars at that point?

A. They have.

Q. Did they have at that time?

A. They did.

69 The COURT. Is not that covered by your agreement?

Mr. HOBART. I think so.

The COURT. It certainly says so.

Mr. DOHERTY. I rather think it is.

The COURT. We do not want to reinforce what the parties have agreed upon.

Q. Coming to the cars mentioned in counts from 9 to 26, did you ride any of those drags of cars in their movement?

A. I rode all of them.

Q. From your experience as a railroad man what would you describe those drags of cars to be?

A. Trains.

Q. Does that apply to each one of these drags?

A. Yes, sir.

Q. Now, are you familiar with the local situation at Jersey City?

A. Yes, sir.

Q. What would you call the collection of tracks at Jersey City on which the cars are shifted?

A. Classification tracks for the making up of trains.

Q. What would you call the whole group of classification tracks there, limiting your answer to those classification tracks at Jersey City?

A. A yard.

Q. Is there a similar group of classification tracks at Bergen?

A. There are.

Q. What, among railroad men, is such a classification, group of classification tracks as is at Bergen called?

A. A yard.

70 Q. Are you familiar with a similar group of classification tracks at Weehawken?

A. Yes, sir.

Q. Will the same answer apply to the designation to the group of classification tracks at Weehawken that is applied to the others?

A. It does.

Q. In each case it is a yard?

A. Yes, sir.

Q. Do you know whether or not there are distinct freight stations at Jersey City, Bergen, and Weehawken?

A. There are.

Mr. DOHERTY. I believe the distance is in evidence.

Q. In repair work on railroad cars is there a distinction between light repairs and heavy repairs?

A. There is.

Q. What are light repairs?

A. Light repairs is the putting in of couplers, maintaining and repairing anything to the coupling mechanism—grabirons on cars, putting the wheels in the cars and ratchet bars and truck frames of cars.

Q. What are heavy repairs?

A. Heavy repairs are the putting in of longitudinal sills, cross sills, end sills, roofs on cars, sidings and sheathing on cars.

Q. Where may light repairs be made?

A. On repair tracks at any point where they might have such tracks, or, with some repairs, upon any track where the defect is found.

Q. Where repairs are made on tracks not specially designated as "repair tracks," what, if any, precautions are necessary to be taken?

71 A. The rules of the company provide that a blue flag be placed on either end of the track or train to designate that car repairmen are working on those tracks.

Q. To indicate that carmen are working on those tracks?

A. Yes, sir.

Q. At each of the yards of which you have spoken—Jersey City, Bergen, and Weehawken—is there a particular yardmaster?

A. Yes, sir.

Q. And the yardmaster is in charge of that particular yard?

A. Yes, sir.

Q. The tracks where switching is done, are they within those particular local yard limits or outside of them?

A. Within the particular yard limit or independent yards.

Q. That is where the switching is done?

A. Yes, sir.

Q. And classification?

A. Yes, sir.

Q. To make up trains?

A. Yes, sir.

By Mr. HOBART:

Q. Are you speaking of these places in particular or generally?

A. Each particular yard. I have reference to these particular yards.

By Mr. DOHERTY:

Q. And it is true generally, too, isn't it?

A. Yes, sir.

72 Q. I wish to direct your attention to the car mentioned in count seven, Erie car 101062. Will you describe the nature of the defect in Erie car 101062, as observed by you on January 27th?

A. The coupler was missing on the A end of the car; end of draft timbers broken off.

Q. In your opinion state whether or not it required light or heavy repairs to place that car in proper condition for use.

Mr. HOBART. That is objected to as calling for a conclusion.

The COURT. I think he should say what was necessary to be done and let the jury determine whether that was light or heavy repairs. He may say what was necessary to be done in order to put that car in shape—whether it was necessary to be relieved of its load, if it was loaded, and what was necessary to be done.

Q. In the first place, was that a loaded car?

A. An empty car.

Q. What was necessary to be done to put that car in proper condition to use?

A. Take off the draft timber bolts that remain to the boards of the draft timbers and replace new draft timbers by putting bolts through your centre longitudinal sills, and bolting your draft timbars up to the draft or centre sills, and placing your coupler in again.

Q. How many men would that require?

A. Why, for putting in the draft timbers—one man can put them in; one man can put a coupler in, but the general practice is to use two men for placing a coupler in.

Q. How long would repairs of that nature take?

A. Possibly between three and four hours to complete it.

73 Q. Would any particular place be required for the doing of that work?

A. Any repair track that work could be done on.

Q. At suggestion of counsel for the defendant, I will ask the witness if these defects referred to in the first eight counts were found by you in the yards from which the trains were moved.

A. They were.

Q. Yes; and you had no means of knowing whether those were old defects or recent defects?

A. No.

Cross-examination by Mr. HOBART:

Q. Some of these cars mentioned in the first eight counts that were marked defective, were marked for the shops, were they not?

A. They were.

Q. Had sort of a tag mark on it indicating they were to be taken to the shops?

A. Yes, sir.

Q. Do you happen to know where the railroad shops were located at that time?

A. Yes, sir.

Q. Where were they?

A. The shops are at Pen Horn, the railroad term for it, or Bergen.

Q. And that is one of the freight yards we have been discussing, is it not?

A. Yes, sir; for heavy repairs.

Q. At the westerly end of the tunnel?

A. Yes, sir.

Q. So that in order to take these cars that were defective to the shop they would have to be moved from the place where they were found defective, through the tunnel, and so on to the shop at the other end; is that right?

74 A. No, sir.

Q. I mean if they were going to the shops?

A. Yes, if they were going to take them to the shops to repair them.

Q. There is no repair shop at Jersey City proper, is there?

A. There is no repair shop at Bergen, either.

Q. What is there there?

A. Repair tracks at Bergen, with a blacksmith shop and a carpenter shop for framing the sills of cars. But the repairs are made out in the open, upon the repair tracks.

Q. Now, coming back to Jersey City as being distinct from Bergen, there is nothing at Jersey City except this repair track, is there?

A. A repair track and a machine shop.

Q. The machine shop is not for the purpose of making repairs to cars, is it?

A. Some parts of them; they get, possibly, sometimes, some blacksmithing done there.

Q. Yes, but that is not the same as we call it at Pen Horn, or Bergen?

A. No, sir.

Q. And as I understand it, there isn't even any particular track assigned there for repairs?

A. No particular track assigned.

Q. Now, referring to this one car in count number seven, what is a draft timber?

A. A draft timber is a timber about 4½ or 5 inches in thickness by 8 to 8 inches in depth and varies from 4½ to 5½, 6 feet in length; and they come from the end of the car and run back to the transom of the car, or body, and are bolted up to the centre longitudinal sills; and in the centre is placed your coupler, your draft springs, and your fillers and filler plates fastened in, some fastened in there, some
75 of them with what is known as a pocket-coupler, some with a chain-pin coupler, and other couplers are fastened by keys going through the draft sills and through the couplers, and keyed in.

Q. Now, with that condition of the draft timber as you found it in this particular car, would it be necessary to put in an entire new draft timber?

A. Yes, sir.

Q. So that the old bolts would have to be taken out and new ones put in?

A. Yes, sir.

Q. How much would that draft timber weigh?

A. The draft timber would possibly weigh from one hundred to one hundred and twenty pounds.

Q. And it would take two men, you think, three or four hours to make the necessary repairs?

A. Probably that time.

Q. And if the car was on the track for that length of time, the car would be holding up all other cars?

A. It would be.

Q. And, of course, that would hold up any movement of cars on that particular track where the repairs were being made?

A. That car should be placed on a repair track.

Q. But if it were placed upon the track on which you found it, for the purpose of being repaired, it would tie up the movement of cars?

A. Yes.

Q. But it had to be removed from the track where you found it to the repair track proper, is that right?

A. Yes, sir.

Q. Do you remember what track you found that car on?

A. On track No. 1.

Q. Track No. 1 at Jersey City?

76 A. Yes, sir.

Q. And you know the location of what you call the repair track at Jersey City?

A. Yes.

Q. How far from that is track No. 1, about?

A. I think there are four or five tracks between track No. 1 and the repair track.

Q. In order to remove that car from that track to the repair track you would have to move the car out to the main track in order to move it again to the repair track?

A. Yes, sir.

Q. How long a movement would that car have to make in order to do that?

A. Possibly, moving forward and back on to that track, I should say approximately an eighth of a mile.

Q. Now, you referred to these three yards which we call Jersey City, Bergen, and Weehawken. You spoke as if they had certain limits. Do you know whether at that time there were any yard-limit signs?

A. The yard-limit sign, the only one that I recall, was—it was not a yard-limit sign either; it was a sign at the western end of the tunnel saying "New York Terminal Division."

Q. That is not what you would call the yard limits?

A. Not a yard-limit sign.

Q. Then, as a matter of fact, there were no yard-limit signs to any of these yards?

A. No, sir.

Q. So far as you saw?

A. No, sir.

Q. And were not when you worked there?

A. I never worked in those yards.

Q. Where did you work when you were in the employ of the Erie Railroad Company?

77 A. At Buffalo.

Q. Was there anything in January and February, 1911, at the time you were making these inspections, was there anything anywhere to indicate any yard limit as to any of these three yards of which you have spoken?

A. Yes; because when you leave Jersey City yard, at about Grove Street you enter upon the main tracks leading from that yard through the tunnel to Bergen yard; and when you leave Willow Avenue yard, at Weehawken, you are upon the main tracks through the tunnel into Bergen.

Q. Wht you call the main tracks, as a matter of fact, they are the tracks connecting these three yards, aren't they?

A. They are the tracks that are used for the movement of these trains from one yard to another.

Q. And, so far as physical appearance or the condition of things is concerned, there is nothing to tell where the yard limit ends and something else, begins, is there?

A. Only as to the number of tracks used for classifying trains in each independent yard.

Q. That is, at certain points there are three or four tracks and at certain other points two or three?

A. Yes, sir.

Q. Now, you spoke of freight stations at these three yards. Have you made special observation there to know what the practice was in January and February, 1911?

A. The practice is——

Q. (Interrupting.) Was at that time.

A. ——was that cars were billed from Weehawken to destination, and billed from Jersey City to destination, and billed from Bergen to destination.

78 Q. Are you sure of that last?

A. From Bergen or Bergen Junction. The name Croxton is used now.

Q. That is simply another name used recently in place of Bergen?

A. I understand so.

Q. Are you sure it was not Bergen Junction?

A. I can recall that bills that I have examined as from Bergen. Possibly they might not have used Junction.

Q. You never examined the tariff sheets to see how it is on the tariff sheets?

A. No, sir.

Q. You don't happen to know, do you, whether at Bergen there was a freight station in the sense that people were permitted to get their freight there—that is, drive up with wagons and get freight?

A. No; there is no freight house there for the delivery or receiving of baggage and freight, other than in carload lots at some private or individual sidetrack.

Q. In other words there is no general freight station for the use of the public?

A. Not at Bergen. When I speak of Bergen I mean the Junction and all of its yards in the Bergen district.

Q. In other words, practically everything as far as the Hackensack River west of the tunnel.

A. Now, really, I don't know where the Hackensack River is.

Q. That is the fact. Now, I understand it, coming back again for a moment to these defective cars in the first eight counts, as I understand it you have no means of knowing in any one of the cases how long the particular defects you found have existed?

A. Only from the time we first inspected it.

79 Q. Yes; that's what I mean.

A. Prior to that I cannot tell how long they had been defective.

Q. And so far as you know to the contrary, the particular defects may have been caused within a few minutes or a few hours before you discovered them?

A. Yes, sir; they might have.

Q. Now, referring again to these tracks that you call main tracks—coming back to the time you were speaking of yard limits, do you happen to know whether at the time in question these main tracks, as you call them, were used for passenger trains?

A. They were not.

Q. And do you know whether or not these main tracks, as you call them, were used by any trains that were regular scheduled trains?

A. Yes.

Q. Well, which train, which drag?

A. Trains known as numbers 77 and 87.

Q. Freight trains?

A. Yes, sir; high-class freight trains.

Q. Those are the same trains referred to in the stipulation that you assisted in preparing?

A. Yes, sir.

Q. Those are the only ones that you know of as schedule trains?

A. The only ones I know of.

Q. And they moved over the tracks only from Jersey City to the Bergen tunnel?

A. The westerly portal of the Bergen tunnel.

Redirect examination by Mr. DOHERTY:

Q. If a car is marked for the shops, what is the meaning of that in railroad parlance?

A. To be placed upon a repair track for repairs.

80 Q. Does it have any meaning calling for the sending of that car into any building called "shops"?

A. No, sir.

Recross-examination by Mr. HOBART:

Q. All it means is that the company's inspectors have found something wrong?

A. Yes, sir.

Q. And have marked it for the yard repairers, who repair it; is that so?

A. Yes, sir.

THOMAS GIBBON sworn in behalf of the Government.

Direct examination by Mr. DOHERTY:

Q. What is your occupation?

A. Inspector of safety appliances for the Interstate Commerce Commission.

Q. How many years?

A. Five years and six months.

Q. Before that were you a railroad man?

A. Yes, sir; locomotive engineer, fireman, shop repair man.

Q. For how many years?

A. Altogether on a railroad for over twenty years.

Q. Did you ride any of these drags of cars mentioned here in counts 9 to 26?

A. I did ride them all, accompanied by the other inspectors.

Q. What is the highest rate of speed that you observed on any of these transfers?

A. About eighteen miles per hour, which was made through the tunnel.

Q. In your opinion, what were these drags of cars?

Mr. HOBART. I object to that on the ground that it is a matter
81 for the jury, or, rather, for the court to decide according to the facts as proven or admitted.

The COURT. Does it take an expert to tell whether a collection of cars being hauled is a train or not?

Mr. DOHERTY. I don't think so.

The COURT. He may say whether they were similar to ordinary trains, equipped with an engine and caboose, or not, and then it will be a question for the jury as to whether or not it was a train.

(After argument.)

Q. How are these transfer trains made up?

A. They were assembled the same as any other train.

Q. And at one of the yards in question—at one of these particular yards in question they were assembled?

A. Yes, sir.

Q. And was there any switching out of them or into them in the course of the transfer?

A. I observed no switching whatever in any of the movements.

Mr. HOBART. We admit that there was not any switching.

By the COURT:

Q. Do you mean, by assembling, made up as any other freight train, that they were made up with respect to point of destination, or were all the points of destination the same with these different trains?

A. What I meant by that, they were made up the same as you would observe a train ready to leave the tunnel.

Q. That is, the same as the ordinary observer would?

82 A. Yes, sir.

Q. I thought you meant in respect to point of delivery, leaving off cars, or something of that kind.

A. No, sir.

By Mr. DOHERTY:

Q. A train going at the rate of eighteen miles an hour, whether or not it is easier to start that train if the air-brakes on all the cars are operated than if they were coupled up—can you stop that train easier?

A. Yes, sir.

Q. Within what distance could you stop a train which did not have its air hose coupled up, going at the rate of eighteen miles an hour?

A. That would depend largely on where you mean and upon the condition of the elements, the condition of the rail, and the fault that was in the mechanism, or along the way, rather.

Q. Take it in the month of January, in this climate, and on a track of the grade that is at the tunnel.

WITNESS. Running eighteen miles an hour?

Mr. DOHERTY. Yes.

WITNESS. Averaging up the number of cars in trains similar, you mean?

Mr. DOHERTY. Yes, sir.

WITNESS. How long it would be required to stop?

Mr. DOHERTY. Yes; over what distance would it go before he could stop—approximately?

A. I have never made any tests under such circumstances, but from my practical experience——

Mr. HOBART (interrupting). I object if you have not made any tests.

Q. How long have you run an engine?

A. Six years and a half; nearly seven.

83 Mr. HOBART. I don't think he will be allowed to guess.

The COURT. I overrule the objection, with an exception to the defendant. I think he can give his opinion and the jury can consider it for what it is worth. As I understand, some of these cars do have air-brakes coupled up.

Mr. DOHERTY. A few of them.

The COURT. The hypothetical question does not take into consideration all the facts that are in the testimony. I will permit the question.

Mr. HOBART. I desire to enter an objection to it as immaterial.

The COURT. That is the most substantial objection, I think. How is it material?

Mr. DOHERTY. I think the statute is mandatory in requiring the cars to be coupled up with air, for the purpose of enabling the engineer to control the speed.

The COURT. Exactly. So that if your contention is correct, what difference does it make whether a train stops immediately or within a thousand yards?

Mr. DOHERTY. Absolutely none. But we want the question determined by a higher court.

The COURT. I think what the Government is after is to present a case to which the statute ought to be applied, rather than a mere construction of the statute; I mean with respect to the operation of the cars. The dangers themselves are immaterial. It seems to me it is a question of absolute obedience to the statutory requirement.

I do not think we need take up time on this question.

84 Cross-examination by Mr. HOBART:

Q. Mr. Gibbon, you spoke of one of these drags of cars as going at the rate of eighteen miles an hour?

A. About that; yes, sir.

Q. And you had reference to one of the drags in the cases that are referred to as the air-brake cases?

A. Yes, sir.

Q. And there were eighteen of them—eighteen such cases now under consideration?

A. Yes, sir.

Q. And one of them ran at the rate of eighteen miles an hour?

A. I don't know but more of them did, without referring to my notes.

Q. You are only sure of one?

WITNESS. You are speaking of the one I testified to?

Mr. HOBART. Yes.

A. Yes, sir. I answered as to that.

Q. Is that the only one you remember about?

A. From memory.

Q. Do your notes show the rate of speed of all the drags?

A. I think so.

Q. I wish you would look at them. We want to bring out all the facts of the case. Have you your notes before you?

A. Yes, sir.

Q. And will they show the rate of speed of these other drags?

A. Yes, sir.

Q. Well, take count No. 9, the first of the air-brake violations?

A. Yes, sir. About seven miles per hour.

Q. Now, will you take them all up in order?

85 A. Yes, sir.

Q. And tell us the rate of speed of these several drags of cars known as the air-brake cases. Take No. 10.

A. Count No. 10 I have; is eight miles per hour, about.

Q. Yes.

A. Count No. 12 is about seven miles per hour.

Q. You spoke of No. 12; did you mean No. 11?

A. Count No. 12.

Q. Yes. Well, now, how about count No. 11?

A. Between ten and twelve miles per hour.

Q. The next, then, would be No. 13? Just make sure of the rate of speed of No. 11.

A. Between ten and twelve miles per hour.

Q. Now go to No. 13.

A. About eighteen miles per hour.

Q. That is the one you referred to in reply to Mr. Doherty's question, as going at the rate of eighteen miles an hour?

A. I can't say that was the one, because I was talking from memory.

Q. Go right on with the rest of them. Now take No. 14.

A. About twelve miles per hour for count No. 14.

Q. No. 15, I think, is the next.

A. No. 16; about twelve miles per hour.

By Mr. DOHERTY:

Q. You have not answered as to No. 15 yet.

A. No. 15; about twelve miles per hour.

By Mr. HOBART:

Q. You have already covered No. 16; now go to No. 17.

A. I have no notes of that one.

86 Q. You have no independent recollection aside from your notes?

A. Not of that particular train; no, sir.

Q. All right. No. 18.

A. About twelve miles per hour.

Q. No. 19.

A. About twelve miles per hour.

Q. No. 20.

A. Between ten and twelve miles per hour.

Q. No. 21.

A. About eighteen miles per hour, the highest speed.

Q. You mean by that that it did not go at that rate of speed all the time you were on it?

A. No. The highest speed attained was through the tunnel.

Q. And the rest of the time, how was it going?

A. This was where I took it.

Q. You don't recollect the speed at any other time?

A. Approximately, from memory, eight to ten miles an hour.

Q. No. 22.

A. About eight miles per hour.

Q. No. 23.

A. "This train was three and a half minutes passing through the tunnel, about seven-eighths of a mile long." That is the record I have.

Q. No. 24.

A. A speed of about ten miles per hour.

Q. No. 25.

A. About twelve miles per hour.

Q. And No. 26.

A. About eight miles per hour.

Q. Now, you, in your capacity as engineer, I think you said, and work on a railroad, were, of course, familiar with the way in which trains were made up?

87 A. Yes, sir.

Q. What road did you work for?

A. The D., L. & W.

Q. Does an ordinary freight train on the D., L. & W. road have a caboose at the end of it?

A. The ordinary freight train, yes.

Q. Was there any caboose at the end of any of these trains, as you call them?

A. No, sir.

Q. Do you know what a train is according to the rule book?

A. Why, I think I do.

Q. Can you tell us, without looking at the book?

A. I will try to.

Q. All right; try it.

A. A train is an engine with or without cars, with markers displayed at the rear.

Q. Then this definition I show you in this book [indicating] called "Erie Railroad Rules" you would say is correct according to your understanding?

A. I would say that is the one that is used for the definition of a train, generally speaking, but not altogether.

Q. And you have heard of the American Railway Association?

A. Yes, sir.

Q. What is it?

A. Composed of the general managers of the railroads of the United States.

Q. Covers practically every railroad in the country, doesn't it?

A. Yes sir; that's my understanding.

Q. And they get out what they call general or standard rules, don't they?

A. Yes, sir.

88 Q. I call your attention to a book called "Standard Code of the American Railway Association." You have seen that before, haven't you?

A. Yes.

Q. That is recognized throughout the country as a standard of rules, is it not?

A. On railroads, yes, sir.

Q. What is the definition of train as given in this code? Just read it, if you will.

A. (Reading:) "An engine, or more than one engine, coupled with or without cars, displaying markers."

Q. Now, that leads us to another question. The question is, what is a marker? I refer you to the rules in that connection, and I show you rule No. 19 of the Erie Railroad Company. I think your attention has been called to that before, hasn't it?

WITNESS. My attention?

Mr. HOBART. Yes.

A. No, sir.

Mr. HOBART. Well, look at it now, if you will.

WITNESS. Do you refer to paragraph A?

Mr. HOBART. To rule No. 19.

WITNESS. Yes.

Q. That refers to markers, does it not?

A. I haven't reached it yet, hardly.

Mr. HOBART. I beg your pardon.

WITNESS. Do you want me to read this aloud?

Mr. HOBART. Yes, if you will.

WITNESS (reading): "No. 19. It is required that the following signals be displayed: One on each side of the rear of every train, as markers, to indicate the rear of the train; by day, a green flag; by

night, a green light to the front and side and a red light to the
89 rear, except when the train has turned out to be passed by another and is clear of the main track, when it is required that a green light be displayed to the side and rear."

Q. I now call your attention to corresponding rule No. 19 of the Standard Code of the American Railway Association and ask you to look at that and state if that is not practically the same so far as the definition of markers is concerned.

A. Very little different.

Q. Will you read that, too, if Mr. Doherty has no objection?

Mr. DOHERTY. No objection at all.

A. Rule No. 19 from the Standard Code. (Reading:) "The following signals will be displayed: One on each side of the rear of every train, as markers, to indicate the rear of the train. By day, green flags; by night, green lights to the front and side and red lights to the rear; except when the train is clear of the main track, when green lights must be displayed to the front, side, and rear."

Q. And this rule of the Standard Code is like the other one we refer to, which is recognized as the Standard Railroad Code?

A. The Standard Code is recognized as authority on all their rules, I believe.

Q. Well, it is referred to, in fact, as an authority.

Mr. DOHERTY. I object to that on the ground that Mr. Gibbon is not an authority on the authorities.

Mr. HOBART. I withdraw the question.

It is agreed between counsel that none of these transfer trains had the air hose coupled up except in the cases of transfer trains
90 in counts 15, 17, 18, and 19 referred to in the stipulation, which had a limited number of cars with the air hose coupled up.

It is also agreed that the defendant railroad company received notice of the order of the Interstate Commerce Commission of the sixth of June, 1910, making operative the requirement that not less than 85 per cent of the cars shall have their brakes so used and operated.

Mr. DOHERTY. I offer this order and it is admitted that it was duly received.

(The order referred to was marked "Ex. G. 1" and was ordered spread on the record, and is in words and figures following:)

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of June, A. D. 1910.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, commissioners.

In the matter of requiring an increase in the minimum percentage of power brakes.

The commission having under consideration the question of requiring an increase in the minimum percentage of power brakes to

be used and operated on trains and railroads engaged in interstate commerce, as provided by section 2 of the act of March
91 2, 1903, and it appearing to the commission after full hearing had on May 5, 1909, due notice of which was given all common carriers, owners, and lessees engaged in interstate commerce by railroad in the United States, and at which time all interested parties were given an opportunity to be heard and submit their views, that to more fully secure the objects of the act to promote the safety of employees and travellers on railroads, the minimum percentage power-brake cars to be used in trains, as established by its order of November 15, 1905, should be further increased.

It is ordered that on and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the safety-appliance act as amended March 2, 1905, any train is operated with power or train brakes, not less than 85 per cent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 per cent shall have their brakes so used and operated.

A true copy.

[SEAL.] JOHN H. MARBLE,
Secretary.

At this point the court took a recess of one hour.

92 AFTER RECESS.

PATRICK FOX, sworn on behalf of the Government.

Direct examination by Mr. DOHERTY:

Q. What is your occupation, Mr. Fox?
A. General foreman of car repairs.
Q. For what railroad?
A. The Erie Railroad.
Q. Where are you stationed?
A. Jersey City.
Q. Do you know whether or not there is a force of repairmen at Weehawken?
A. Yes, sir.
Q. How many men?
A. Now, the day force consists of twelve men.
Q. Are light repairs made at Weehawken?
A. Very light repairs; yes, sir.
Q. And when they are made, you have no special track?
A. No, sir; we have no track assigned to it.
Q. You have repairs made on any track and then guard the track?
A. Men repairing trains prior to their departure.
Q. And these repairs are made on various tracks there at Weehawken every day?

A. Yes, sir.
Q. And that was so in January, 1911?
A. Yes, sir.

Cross-examination by Mr. HOBART:

Q. What kind of repairs were made at Weehawken every day?
A. We put on brake-shoes, journal bearings, air-brake hose, and certain other light repairs.
Q. And when they were not light repairs where were the cars fixed.
93 A. At our terminal shop at Pen Horn.
Q. How would they get there from Weehawken?
A. Why, move them out there.
Q. You said you were the general foreman?
A. Yes, sir.
Q. Covering what territory?
A. The New York Division, practically, and side lines.
Q. Well, does that include these three yards that are referred to in this case, namely, Jersey City, Weehawken, and Bergen?
A. Yes, sir.
Q. So you now have and did have at that time jurisdiction over all those three yards?
A. Yes, sir.
Q. And all the inspectors and repairmen working in those three yards got their orders from you?
A. Yes, sir.
Q. Were working for you?
A. Yes.

Redirect examination by Mr. DOHERTY:

Q. How many car repairers did you have at the Jersey City yard?
A. There was, all told, including the day and the night forces, thirty-four, and out of those thirty-four we term about seven of them repairmen.

Recross-examination by Mr. HOBART:

Q. You have told us the number of men you had at Jersey City and Weehawken.
A. Yes, sir.
Q. How many at Bergen?
A. Bergen is our main shop. We keep about a hundred men there, as a rule.

94 EMIL J. BAUER, sworn on behalf of the Government.

Direct examination by Mr. DOHERTY:

Q. What is your occupation?
A. Freight agent, at Jersey City, of the Erie Railroad Company.
Q. Of the Erie Railroad?
A. Yes, sir.

Q. And you have charge of the tariffs that are in effect on that railroad?

A. The tariffs that apply at Jersey City?

Q. Yes.

A. And through that territory there.

Q. In making up freight rates, are there three distinct stations, one at Jersey City, one at Bergen Junction, New Jersey, and another also at Weehawken?

A. There are three stations, one at Jersey City, one at Weehawken, and one at Bergen.

Q. [Indicating.] I hand you these tariffs. Will you tell us if there is a rate established for freight from Weehawken to Jersey City?

A. There is.

Q. A rate from Weehawken to Bergen?

A. There is.

Q. Is there a rate from Jersey City to Weehawken?

A. Yes, sir; there is.

Q. And a rate to Bergen?

A. Yes, sir.

Q. And is there a rate from Bergen to Weehawken and Jersey City?

A. Yes, sir, there is.

Q. And freight is accepted, under those rates, from any one of those three stations to the other?

A. Yes, sir.

95 Cross-examination by Mr. HOBART:

Q. Is local freight accepted at Bergen from either of those other two stations in less than carload lots?

A. Yes; according to this tariff, on general merchandise.

Q. What did you say your position was?

A. Freight agent at Jersey City.

Q. Covering what?

A. Covering the lighterage department throughout New York Harbor.

Q. Including what points?

A. Including Bergen, Jersey City, and Weehawken.

Q. Do all the men in your department, as such, report to you?

A. All the men, excepting a few that are at Weehawken and at Bergen, that report in the local office there.

Q. Outside of those few they all report to you as general freight agent of the entire territory?

A. As general freight agent of the entire territory; yes, sir.

Q. Was that your position in January, 1911?

A. Yes, sir.

Q. And the freight that comes into Weehawken and into Jersey City is all handled under you?

A. If destined to points in New York Harbor.

Q. Does it all come destined to those points?
A. About ninety per cent of it.
Q. The rest is destined where?
A. For local delivery at Weehawken, or Jersey City, or Bergen Junction.
Q. These three points, then, are, together, to be considered as yards for New York Harbor points?
Mr. DOHERTY. That is objected to.
A. Yes.
96 The COURT. The objection is sustained. I do not think what he considers alters the situation.
Q. Let me ask you what the fact is in that regard, as to freight coming to these three stations, namely, Jersey City, Weehawken, and Bergen. Isn't it a fact that freight destined to New York Harbor points is held at either one of these three yards, and that they are holding yards for that class of freight?
A. It is.
Q. And was that so in January and February, 1911?
A. Yes, sir.
(The Government rests.)

Mr. Hobart opened for defendant.
HARRY M. RIGHTER sworn in behalf of defendant.

Direct examination by Mr. HOBART:
Q. Mr. Righter, you are a surveyor?
A. Yes, sir.
Q. Did you make this plan of the Jersey City terminal that appears on the standard here?
A. I did; yes, sir.
Q. Does that represent the conditions as they existed in January, 1911?
A. It does.
Q. Will you kindly come down to this map and explain to the jury the various things that are indicated on it, particularly with reference to these colors that you have marked there? Tell what the colors show, first.
A. (Going to the map referred to.) These colors—the tracks
97 colored in red are the main line freight tracks only; the tracks colored in yellow are the main line and side line pasenger tracks; green, the freight tracks leading to the Weehawken docks.
Q. The Hudson River is on the right of the map?
A. The Hudson River is on the right.
Q. What is this you have marked here as "Palisades"?
A. That is a bluff, wouldn't you call it?
Q. Several hundred feet high?
A. Between two and three hundred feet at its most——
Q. (Interrupting.) And two tracks run the length of it?
A. Very close; some places five or ten feet.

Q. The freight tracks run through here [indicating]?

A. What is known as the Bergen Tunnel. Passenger trains go through the Bergen arch.

Q. And where is the Bergen located with reference to the Palisades?

A. [Indicating on the map.] Here.

Q. On the west side of the Palisades?

A. On the west side.

Q. Have you indicated by a wavy line the west end of the Palisades?

A. [Indicating on the map.] This is the end of the Palisades on the west side.

(Cross-examination waived.)

Mr. HOBART. I offer the map.

The map is marked by the stenographer "Ex. D. 1."

98 ABRAHAM B. COHEN sworn in behalf of defendant.

Direct examination by Mr. HOBART:

Q. You are employed by the Erie Railroad Company?

A. Yes, sir.

Q. In what position?

A. General clerk in the superintendent's office.

Q. Were you so employed in January, 1911?

A. Yes, sir.

Q. Did you make up a statement of the number of cars handled at Jersey City, Bergen, and Weehawken during the six months preceding January, 1911?

A. Yes, sir.

Q. What was that statement made up from?

A. From information furnished at the yard clerk's office, and other matters from the company's records.

Q. How long did it take you to make this up?

A. The latter part of September and a few days in October, 1912.

Q. Does this paper I show you represent your work during that time?

A. Yes, sir.

Q. I notice that you have here "Croxton." (I have written over it the word "Bergen.") What was it known as in January, 1911?

A. Known as Bergen.

Q. Kindly look at the statement you have prepared, and without giving all the figures, please tell the jury what it is intended to and does show.

A. I see here, first, under the heading "Jersey City" (that includes all cars arriving from Bergen, arriving in side line trains at Jersey City, and arriving at Weehawken) we also show, as a separate
99 heading—next it shows "cars received from connecting lines at Jersey City," and a separate heading for westbound, showing cars received for westbound movement from connecting lines.

Q. At the top you have the word "East."

A. That means eastbound from Bergen, Weehawken, and side lines. Westbound is from Jersey City to Bergen and side line and through fast freights. The next indicates cars received from New York, Susquehanna & Western, westbound, or dock terminals. Those cars should be added to the first set of figures, to get the total number of cars passing through Jersey City.

Q. What next?

A. Bergen. Shows all cars arriving in the advance yard at Bergen, from the west, on main line or side lines. That's eastbound. Westbound are cars departing from Bergen proper and to the side lines, to and from. Next, "received"—says "cars received from Pennsylvania, D., L. & W., N. Y., S. & W. Railroad"; westbound is vice versa, delivered from Bergen to the three respective railroads. Weehawken—says "cars received, eastbound, from Bergen and from Jersey City." Westbound shows vice versa. These have also to be added to and from the connections at Weehawken. We have a separate table for that. That means received for connections, namely, West Shore, New York Central, and Hudson River Railroad, via float; Long Island via float, and outside terminals, Jay Street, and Bush Dock. We have delivered from connections at Weehawken, vice versa, cars received from the West Shore, from the New York Central—the Hoboken Shore should be added in also—and from Long Island by float, from outside terminals, Bush terminal and Jay Street. At the bottom I have here included in my to and from connections at West Hoboken cars that we handle from the West Shore to Hoboken Shore and vice versa. They are cars that don't pass to any other point; delivered direct to Hoboken Shore, because they have no direct connection and have to cross our tracks. That's the whole statement.

Q. In preparing this statement, how many times did you count each car?

A. At Croxton it is—it don't make any difference how many times it is handled it is not counted only that once; and when it arrives at Jersey City it is counted as arriving at Jersey City.

Q. Likewise at Weehawken?

A. Yes; the car is counted, not until it is disposed of.

Q. You haven't made up any figures showing the total number of handlings?

A. It would be impossible. Certain cars are switched so many times, you would have to pull the switch out.

Mr. HOBART. It is agreed that the statement referred to may be offered in evidence.

(The statement referred to is marked "D. 2.")

Q. One other question. You have arranged these statements according to the total for each of the six months immediately preceding January 1, 1911?

A. Yes, sir; under the heading of months.

Cross-examination by Mr. DOHERTY:

Q. In your capacity as railroad clerk there, have you knowledge as to whether or not since that time there has been any increase in the number of cars handled?

A. Since that time there has been a big increase at certain times of the year. For instance, in the latter part of 1912 we had a big run of freight.

Q. And the totals would be greater——

101 A. [Interrupting.] Yes, sir.

Q. ——than those given here?

A. Yes, sir.

Mr. DOHERTY. Yes. That is all.

Mr. HOBART. That is all.

EMIL J. BAUER recalled on behalf of defendant.

Direct examination by Mr. HOBART:

Q. Your attention was called to certain freight tariffs for the movement of freight between Jersey City, Bergen, and Weehawken, and so forth. Have you also tariff issued at the time in question indicating switching charges?

WITNESS. At Jersey City, Bergen, and Weehawken?

Mr. HOBART. Yes.

A. Yes, sir.

Cross-examination by Mr. DOHERTY:

Q. Did you have charge of the making up of bills for switching service?

A. At Jersey City and Weehawken?

Q. At Jersey City and Weehawken.

A. Yes, sir.

Q. Not at Bergen?

A. No, sir; not at Bergen.

Q. A train that comes in over the floats, comes to Weehawken, and is transferred to Bergen—is there any switching charge made for that car?

A. If it is to be delivered at Bergen or to go out on the line?

Q. To go out on the line.

A. No, sir.

Q. This switching charge relates solely to those cars which are switched on to sidetracks for delivery at these local points?

102 A. Yes, sir; between Bergen, Jersey City, and Weehawken.

Q. Has no relation whatever to cars that go through that terminal from one point to another?

A. No, sir.

By Mr. HOBART:

Q. You don't make any additional freight charge?

A. No; we bill them at New York rate.

Q. Regardless of whether they are billed to Jersey City, Wee hawken, or Bergen?

A. The same rate applies; yes.

JOHN J. MANTELL sworn in behalf of defendant.

Direct examination by Mr. HOBART:

Q. Mr. Mantell, what is your position?

A. Terminal train master, Erie Railroad, at Jersey City.

Q. How long have you had that position?

A. I have been terminal train master for about a year in Jersey City.

Q. What position did you have before that?

A. I was division train master, travelling yardmaster, yard clerk, assistant yardmaster, general yardmaster—various positions.

Q. What position did you have in January and February, 1911?

A. Traveling yardmaster for the Erie Railroad.

Q. At Jersey City terminal?

A. Covered the Jersey City terminal.

Q. At that time what was the organization that had charge of the Jersey City terminal?

A. There was a terminal superintendent who had charge of freight operation in Jersey City terminal as well as the docks on both sides of the river and some docks in Brooklyn. There was a
103 general yardmaster, who had charge of the three yards, and he had twenty-two assistant yardmasters—about twenty-two assistant yard masters.

Q. You say "three yards." What do you mean by that?

A. Jersey City, Weehawken, and Bergen.

Q. These twenty-two assistant yardmasters; what did they have charge of?

A. They had charge of the three yards. These three yards are subdivided into various tracks and are in charge of individual yardmasters under general charge of the general yardmaster.

Q. I see points indicvated on the map—A, B, C, D, E, F, G; do they represent subdivisions of that yard?

A. They represent subdivisions of that yard.

Q. And is that the way it was in January, 1911?

A. Yes, sir.

Q. I am not sure whether you had finished giving your statement of the organization. You had gotten to the point where you had said there were twenty-two assistant yardmasters. To whom did they make their report?

A. The assistant yardmasters reported direct to the general yardmaster, as well as to the yardmaster in charge of a certain yard.

Q. And then, in addition to yardmasters and their assistants, I suppose you had a number of other men, forming crews, assistant crews, or what not?

A. They had a number of assistant clerks and yard crews who reported to the yardmaster.

Q. Can you give an estimate of the number of men who worked in those crews in January, 1911?

A. In January, 1911, we were working about—let's see—working thirty-five or thirty-six switch engines in those three yards.

104 Q. That is the number of engines. Can you give us the average number of men engaged in yard service?

A. Average about five—it will average six men to an engine, including help engines, which have a large force attached to them.

Q. That would be from two to three hundred men?

A. From two to three hundred men.

Q. That includes all the yards?

A. That does not include yard clerks and so on.

Q. But it includes the operating force?

A. It includes the operating force.

Q. And your clerical force; you had about how many there?

A. I will have to stop and consider.

Mr. DOHERTY. Is that material?

Mr. HOBART. Never mind, then.

Q. At that time were there any yard limits for the Jersey City yard or the Weehawken yard or for the Bergen yard?

A. There was not.

Q. What is the definition of a yard by railroad companies?

A. A yard is a system of tracks within certain limits, used for the——

Q. [Interrupting.] Is this the rule book I show you?

A. Yes.

Q. Is it defined there?

A. It is defined in the rule book.

Q. Is this the rule book that was in force by the company at that time?

A. Yes, sir.

Q. Kindly read the definition of "yard" as it appears in that book.

105 A. (Reading:) "A system of tracks within defined limits provided for the making up of trains, storing of cars, and other purposes over which movements not authorized by time-table or by train order may be made, subject to described signals and regulations."

Q. And is that the same rule that was adopted by the American Railway Association?

A. The same rule.

Mr. DOHERTY. What rule is that?

Mr. HOBART. It hasn't any number; it is just under the head "Definitions."

Q. Now, with regard to the movement of the cars in question in these air-brake cases, were those movements according to schedule?

A. No, sir.

Q. How were they made?

A. As fast as they had assembled enough cars for an engine to drag out they would be started.

Q. Any particular time of day fixed by the company's rules for such movement?

A. No, sir.

Q. Who had charge or direction of such movements; that is, who gave the order when it was to be made on any particular day or movement?

A. The cars are assembled under the direction of the individual yard master in charge of a particular group of tracks where this drag of cars is going to leave, and there are no general instructions issued, as they are all familiar with the general classification, and they are sent to the large classification yard at Bergen.

106 Q. I have asked you about the yard limits of these separate yards. I want to ask you now whether there was any limit, as being recognized, to the Jersey City Terminal?

WITNESS. That is, that whole terminal?

Mr. HOBART. Yes.

A. There is no yard-limit sign, but it is generally understood to extend to the Hackensack River.

Q. What is the purpose of a yard-limit sign?

A. The purpose of a yard-limit sign is to regulate the approach of trains and the passage of trains through the yard; that is, schedule trains, extra trains. Our main tracks, where these schedule trains pass over, are entirely separate, run around our freight yard, don't come through it at all; and we have lead tracks, approaching from these main tracks, where the Jersey City Terminal ends, leading into this yard.

Q. Now, do any of the passenger trains pass over any of the tracks over which these drags of cars in question in the air-brake cases were moved?

A. No, sir.

Q. How many passenger tracks are there, say, between the Hackensack and Hudson Rivers?

A. There are four passenger tracks from Jersey City station to Bergen tower, and several lines diverge from the main line there, and the main line consists of two tracks on out across the meadows and over the Hackensack River.

Q. How far is the Hackensack River west of this Bergen yard—can you tell us about how far that is, from the Bergen yard to the Hackensack?

A. From the extreme west end of the Bergen yard—that is, where trains drill into the yard—to the Hackensack River—that is, where the lead track comes off of the main line—it is about a little over a mile.

107 Q. Now, will you tell us what each of the three yards that we have been referring to, namely, Bergen, Jersey City, and Weehawken, what the area of each was in January, 1911?

A. Bergen yards consist of eastbound, as a receiving yard, known as Yard E, which has ten tracks, and a classification yard, which is known as Yard F, which had thirty-eight classification tracks. Trains arriving into this yard off the main line and various side lines divisions, were broken up over a hump or a switch. We have provided a plan of switching there into various classifications for New York Harbor delivery, as well as for our own dock delivery in Jersey City and Weehawken; classified freight as a commodity handled on individual dock, as well as classifying it for various connections. Westbound yard, known as Yard D, consists of ten tracks, where these drags of cars, as well as trains from off the side-line divisions, are taken care of and are shunted over what is known as a hump into a classification yard which has twenty tracks. There are about thirty to thirty-five classifications made of westbound. In that yard trains are assembled and made up for their proper destinations; in other words, trains are prepared to go out on the road. In the Jersey City yards——

Q. [Interrupting.] Just a moment. Is there anything else in the Bergen yard in the way of a crippled yard shop?

A. In the Bergen yard we maintain a crippled yard shop, consisting of about eight tracks and a shop at that point, and all cars that are crippled and not assembled, other than some light repairs that might be made at water-front yards, or at Jersey City and Bergen, are all sent to this point and placed in the cripple yard, and
108 when repaired are brought out and put in line to go into loaded trains to go to their destinations.

Q. Will you describe what was done with eastbound freight trains when they arrived at the Bergen yard?

A. An eastbound freight train, when it arrives at the Bergen yard, would be pulled into what is known as the receiving yard—that is, Yard E. That train is inspected, the waybills are gone over by yard clerks. Cards are tacked on to the sides of the cars. We have a large engine at that point, known as the hump engine, that pushes these cars on the switch and by gravity they are run down on to the thirty-eight tracks that I have referred to. We make something like forty-five classifications of cars there—that is, eastbound—off of this hump, some of which have to be handled a second time; the train is practically broken up, broken up into forty-five different classifications.

Q. Take it in the case of a freight train that is destined to the West. Is anything done with that at the Bergen yard?

A. Trains that arrive there from off various divisions, as well as drags of cars from Weehawken and Jersey City, are put over a similar hump and about twenty-five clasifications made of these cars.

Q. According to where they are to go?

A. According to where they are to go.

Q. Are any of these trains or drags of cars that start from Jersey City or Weehawken sent through the Bergen yard without breaking up and being classified?

A. No, sir.

Q. Do any of the trains that come from the West pass through the Bergen yard without being broken up and classified?

109 A. Fast freight trains, or trains known as manifest trains, high-class freight, at that time they went through the Bergen yard, and there were other fast trains that would go through to Jersey City without having to be re-switched.

Q. Was that a large or small proportion of the freight that went through the Bergen yard?

A. Where they went through without switching, a very small.

Q. Were there any trains that went through the Bergen yard to Weehawken without being classified at the Bergen yard?

A. I don't recall that any of the trains went through from Bergen to Weehawken that way. There was a time when, on account of serious congestion, there was a few trains went through, but that was against instructions—against our general practice.

Q. Now go to the Jersey City yard.

A. The Jersey City yard is known as a high-class yard, where perishable freight is held for New York delivery.

Q. I am speaking of the freight part of the yard only; not to that part of the yard confined to passenger traffic.

A. Yes, sir; because I haven't charge of the passenger trains or yard.

Q. All right.

A. Highly perishable freight is held in this yard; sometimes as high as three to four hundred cars. The Jersey City yard is an advance yard for the Croxton or Bergen yard. We classify the freight at Bergen, and we pull it into Jersey City or Weehawken, to keep it close to the water-front, waiting for orders. We try and keep all perishable freight at Jersey City because we have icing

110 facilities at that point, and also keep it there subject to orders, subject to lighterage in the harbor.

Q. If perishable freight came in at Bergen in connection with other cars containing freight that was not perishable, would the cars containing perishable freight be taken out and sent on?

A. Yes.

Mr. DOHERTY. Has this anything to do with this question?

The COURT. I suppose it has bearing on the question of congestion in the yard, and, being in accordance with the opening, I will permit it.

Q. Have you finished with your description of the Jersey City yard?

A. No. We have a yard known as the north side yard at Jersey City, that being a local name, and in that yard is held highly perishable freight, as well as some extra freight, such as automobiles, and so on, and we make deliveries to what are known as track terminals—Bush Dock and Jay Street terminals—where we have certain privileges. And in the south side yard we handle grain. At that point

we have an elevator with a capacity of a million and a half bushels, as well as local team delivery, as well as milk trains. We handle there about seventy-two cars of milk a day. We endeavor to keep out of Jersey City yard, so far as possible, all freight known as local freight and hold that in Bergen yards, subject to orders from our agent at Long Dock.

Q. Anything further as to Jersey City?

A. At Jersey City we maintain float barges for the floating of cars to our various stations in New York and Brooklyn as well as to track terminals. We also make up in that yard trains containing high-class freight; also some local trains.

111 Q. While you are on the Jersey City yard, tell us what is immediately south of the Jersey City yard.

A. Immediately south of the Jersey City yard we are right up the Pennsylvania there.

Q. And immediately to the north?

A. Right up against the Lackawanna.

Q. And as you go beyond the Lackawanna?

A. As you go beyond the Lackawanna you strike the steamship piers. There is not a bit of available land there now. We are looking for land now and can't get any.

Q. Was that the condition in January, 1911?

A. Yes, sir.

Q. Crowded condition?

A. A crowded and congested condition.

Q. Now, go to Weehawken and tell us what you know about that.

A. At Weehawken we have eight docks, one a coal dock, two docks that are open docks, on which we handle structural iron, lumber, and different other rough commodities, as freight; and five covered docks on which are handled commodities such as sack and barrel flour materials, tobacco, agricultural implements and so forth. This yard here receives these drags of cars that are switched out in the Bergen yard, and places them on the different docks. Also we have a connection there with the Weehawken Manufacturers' Railroad as well as the West Shore Railroad, and have a town delivery track. We also have a large poultry shed at that point.

Q. Now, can you tell us approximately the number of separate and distinct tracks that are in each of these three yards?

A. Approximately there are about 115 tracks in the Bergen yards, with a capacity of about—a capacity of nearly 5,000

112 cars—say about 5,000 cars. In Jersey City there are about sixty tracks—long or short tracks—the capacity of which isn't over a thousand cars. At Weehawken we have about eighty tracks. The capacity of that yard is about 1,100 cars. That is, when I say capacity, the yard is entirely blocked; it couldn't be operated.

Q. Can you give us approximately the number of miles of tracks in the three yards?

A. We have about 145 miles of tracks in the three yards.

Q. A hundred and forty-five in the three?

A. Yes.

Q. Can you give it separately as to each yard?

A. I could not give them very accurately separate. You can proportion it in regard to capacity. I stated that the Croxton yard is the big yard.

Q. That is located on the meadows?

A. That's on the meadows.

Q. Where you have room to spread out?

A. Yes, sir. We have increased the capacity of that yard since that time. That is the only place left for us to spread out, on the meadows.

Q. Now, I want to ask you the kind of engines that are used in these drags of cars, referring to the air-brake violation?

A. Switch engines designed as such.

Q. What is the difference between a switch engine and a road engine?

A. A switch engine is an engine that does not have an engine truck or a leading shaft to drive the driving wheel; also they are equipped with end-boards; they have sloping tanks, and they are much smaller engines than road engines; and a road engine has a pilot and is different entirely from a switch engine. In fact, the yardmen,
113 in their agreement with the company, object to working with a road engine over one trick.

Q. What do you mean by "one trick"?

A. That is, one day.

Q. Are these drags of cars operated by these switch engines?

A. Yes, sir.

Mr. DOHERTY. If he knows.

Q. Have you looked up the numbers of the engines?

A. I have looked up the numbers of the engines and the trains covered, and they were all operated by switch engines.

Q. And do you know whether at the time in question these engines did anything else except to move these drags of cars between these various points?

A. At the time in question I could not say whether the engines did anything else or not, because we do not keep track of just what the individual engine does; but the general practice is that these engines are engaged in dragging cars from one yard to the other a part of the time and the other part of the time they are switching in the different yards where freight conditions warrant. In other words, if an engine should go to Jersey City yard and the yardmaster would want the use of that engine he would ask the general yardmaster—or in Weehawken.

Q. Did you have any engines designated to make these movements between these three points?

A. These engines—we endeavor to give old men in the service those positions, because they are easier and not as tiring as shifting or switching cars all day.

Q. That brings us to the next point. Is there any difference in the pay of the men in moving cars from one part to another part of the yard and what you pay for ordinary switching service?

114 A. Not any.

Q. Have you examined the agreement of your employees to see if there is any difference in the rate of pay?

A. I am familiar with the rate of pay.

Q. And the men that do this work, are they paid the same as the men that do ordinary switching work?

A. Yes, sir; switchmen, linemen, and roadmen—lines are very closely drawn on rates of pay—that is, by the men.

Q. I mean when men do transfer service are they paid any more than for switching service?

A. No, sir.

Q. What do you mean by road service?

A. Taking trains out on the main line, proceeding over on the main line, out on the road.

Q. Do they get paid different for that service?

A. Yes.

Q. More than for the other service?

A. The rates are different. I am not familiar with the road rates, because I haven't anything to do with the main line.

Q. But at any rate they are different from switchmen or transfer men?

A. Yes.

Q. In other words, do I understand you that there are two separate classifications in the way of rates paid?

A. There are two separate classifications in the way of rates paid.

Q. And is that under agreement with the engineers?

A. Yes; by agreement with the various organizations and the company.

Q. I want to call your atention again to this rule of the com-

115 pany already referred to as being the one in effect at the time in question, and I will call your attention first to the definition of the word "train," which has already been referred to by one of the inspectors. Do you notice that it refers to markers?

A. Yes, sir.

Q. I call your attention to the word "markers," as given in rule No. 19, already read into the record. Is there anything there which contains a picture or illustration of markers?

A. Yes, sir.

Q. Page?

A. Page 63 [indicating]. That is the rear of the train; that's how the lamp should be displayed on the rear of the train—this by day and this by night.

Q. By day two green flags, one on each side?

A. Yes.

Q. And page 63 indicating the signal at night?

A. Showing a red light on each side. It is a lamp showing a light on each side of the rear car of the train; showing red to the rear and green to the front and sides on each side.

Q. And that is the kind of signals or markers that was in use on your regular trains in January, 1911?

Mr. DOHERTY. I object to the form of that question.

The COURT. The objection is overruled.

Plaintiff's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR. [L. S.]
Judge.

Q. And do you know whether that is the kind of marker and signal according to the standard code?

116 A. That is the Standard American Railway signal that was in effect at that time.

Q. I call your attention to the standard code—identified by the Government's witnesses as being the standard, and at page 133 I see what appear to be green flags.

A. That's about it.

Q. And on the next page two lanterns on each side, with red and green lights, as you have told of?

A. That's at page 134.

Q. Was it the practice in January and February, 1911, to equip the rear ends of these trains with markers according to those rules?

A. Yes, sir.

Q. You have referred to the engines that control these movements of cars as switching engines. Is there any other name they go by?

A. Yard engines.

Q. Do the rules define what a yard engine is?

A. Yes, sir.

Q. I call your attention to the rule. Read it.

A. Yard engine. An engine assigned to yard service and working within yard limits.

Q. Is that the rule that was in effect at that time?

A. Yes, sir.

Q. From your observation as traveling yardmaster at the time in question, will you state what the usual speed was of movements such as are in question in this case?

A. About seven or eight miles an hour.

Q. Is there any rule that covers that?

A. No, sir; except that a man moving through yard limits must be under full control and prepared to stop short of obstruction, excepting men running yard engines, and there is a definite limit assigned to the speed at which yard engines will run.

117 Q. Will you find that rule?

A. That rule, 625, the second clause.

Q. And this rule 625, the second part of it, how does that read?

A. (Reading:) "It is forbidden that yard engines without engine truck or pilot exceed a speed of fifteen miles per hour under any circumstances."

Q. These engines that are in question in this case, I think you have already said they had no truck or pilot?

A. No, sir. They come under that rule.

Q. Mr. Mantell, you are familiar, of course, with the operation of that yard and the provisions that have obtained there for some years past?

A. Yes, sir; I have been a yardmaster there.

Q. You know something about air brakes, I suppose?

A. Yes, sir.

Q. How long would it take to couple up the air and test it as you would for road service, for drags of cars containing 25 to 35 or 40 cars?

A. From an hour and twenty to an hour and twenty-five minutes.

Q. How is that?

A. From an hour and twenty to an hour and twenty-five minutes.

Q. Mr. Doherty suggests that I have estimated some at only seventeen cars?

A. Well, the average train is about twenty-five to thirty.

Q. What is that?

A. The average train is about twenty-five to thirty cars.

Q. That is, these drags?

A. Yes.

Q. What time did you say?

118 A. An hour and fifteen to an hour and twenty minutes.

Q. Would all that time be necessary?

A. To prepare these trains the same as we do to go on to the road we would have to have an engineer go on to the train, pump up the air to a certain pressure, which we will say is ninety pounds, to develop any weak air-holes that there might be on the train—seventy pounds is the pressure carried—and after the engine pumps the air up to this pressure she makes a reduction and applies the brakes. Then a force of men go over the train and they measure the piston travel, as it is estimated, of a piston hose, for a travel between six and eight inches, to see that it is kept within the required limit, and after that is accomplished if in any air hose that might be tested at that pressure any holes develop, those, of course, have to be replaced, and different other parts of the mechanism has to be taken care of before the train is allowed to go on the road.

Q. Is that the procedure that is required for road trains?

A. That's the procedure followed, and we use that test to each train going out on the main line.

Q. Would it be possible to have any connection, with drags of cars such as we have in this case?

A. No, sir, I don't think it would.

Q. Why not?

A. Because, especially at Jersey City and Weehawken, we haven't got the room, in the first place, to do it. Cars are going on the floats, being delivered to us from connections, and they're going off the docks, and it is necessary to keep the cars moving generally, going out to the general assembly yard, the general classification yard, which is Bergen; some at Jersey City, cars coming from New
119 York and different dock terminals, it is necessary to keep the cars moving to the general classification yard. As far as Bergen is concerned, we have cars held there for steamship orders, have cars of freight containing California fruit. It is impossible for railroads handling California fruit to get the orders for the fruit before 5.30 in the evening. We handle cars—they arrive there between 7.30 and 3.30 in the morning, as high as 120 and 130 cars of freight. These orders are delivered to us about five o'clock in the evening over the telephone. It takes about twenty minutes to transcribe the car numbers; then it takes from twenty to twenty-five minutes to locate these different cars on the tracks; then we are probably longer than that, over thirty minutes, getting out the cars we want for the different consignees, and we have to keep different consignees' cars together. It is necessary to get away from our float bridges to our fruit dock at the foot of Duane street two hours after we begin calling these parties there. To get those ten cars on those floats there it is sometimes necessary to handle as high as ninety to a hundred cars, and succeeding floats must go over on an average of every thirty minutes. We maintain a big force of men to handle this fruit. At that time we had to carry each box of oranges out on the dock and back again. We were about able—our men were frequently unable to get through at the time specified; they would order a big load and we wouldn't have it over in time. These fruit dealers come around at four and five o'clock in the morning and inspect the fruit, look it over. They have different programs spread around on the dock and buyers come there and they take a program and select the fruit they are going to buy. We are the natural fruit market for California fruit.

120 Q. Suppose you had to couple up your brakes while handling those fruit cars at Jersey City, what would happen?

A. We did attempt to couple up the air on trains last summer and fall, on those fruit trains, and the consequence was that we dumped severals cars of fruit on the Jersey meadows, and we have a good many claims on our records as a result, and we are threatened with a diversion of the fruit business from Jersey City. We had to hold this fruit in Bergen. After, this order was rescinded, as it was impossible to get this fruit out. We didn't know how many defective brakes we had. They made an attempt to comply with the law, but no pistons were measured, and then with the congestion that came in September and October, they would return the fruit—wouldn't have anything to do with it. The fruit people at that time told our fruit agent, Mr. Case, that they were very dissatisfied with the manner in which the Erie Railroad Company had been handling the

fruit business. It is a business that the Erie Railroad Company has been handling for a good many years, and it is about as good a paying business as the Erie handles from Chicago to New York. We run this fruit from Chicago to our Bergen yard in about fifty-four hours, which is very high-class service.

Q. Is there any other congestion to interfere with the coupling up of these cars with air—anything else besides fruit traffic?

A. Yes, sir; we maintain a transfer station at what is known as Bergen, because we have no facilities to maintain one at the water front. We take L. C. L., less than carload, lots there. In other words, if we ship a package it goes into a car with other freight and goes to Croxton transfer; it is taken from severals cars there
121 and goes to five other stations in New York and about six stations in Brooklyn. We take freight from Brooklyn points and New York points up to four o'clock in the afternoon, the same as the other railroads. We take these less-than-carload lots over and run them to Bergen transfer; they are put in the proper cars at that transfer, loaded into proper cars for St. Louis, Chicago, San Francisco, and other points. That freight is on its way at eleven o'clock. We can not delay that train beyond eleven o'clock, because if we do we can not compete with other railroads maintaining second morning delivery in Chicago and third morning delivery in St. Louis and other points; and coupling up the cars to go to Croxton, it would not mean early morning delivery at the various destinations. That train has to leave Bergen yards about eleven or eleven-thirty p. m., at latest, in order to make the train to Chicago. We run that train through to Chicago in about fifty-two to fifty-three hours.

Q. In order to do that you have to do what?

A. The cars come in on floats from these different stations; a switch engine grabs hold of these cars and runs them out to Bergen. In other words, they are taken from the barges at 6.10, leave at 6.20, on the way to Croxton; at 6.30 we have the docks working; by 6.40 it is transferred and goes forward in trains to various destinations.

Q. Is there anything else in the way of congestion in the yard which would interfere to any extent with a strict compliance with this statute?

A. Yes. With the service that we have got to maintain and that we are forced to maintain we have to pick our cars from our different points along our various side lines and run them to Jersey City. When they are in Croxton they are considered as in Jersey City. Long Dock is handled through Jersey City by switch engines.
122 Live poultry comes to Bergen yards. This live poultry we handle a good many cars of, and if we don't have it close to Weehawken yards in an hour we are subject to complaint by shippers. I have been criticized for having poultry delayed an hour or an hour and a half.

Q. The crews that run these trains to Bergen—do any of them go with the trains any further than Bergen, with the exception of these few through trains you spoke of?

A. These drag cars or switch cars don't go further than Bergen. There are a few of these through trains, highly important trains, that would go through if we had through orders for them; yes.

Q. Most of them do not go through that way?

A. Well, we run as much of the freight into Jersey City as possible, to keep it at the water front; what we can't run in there we have to hold at Bergen yard.

Q. What is the mileage of the Erie Railroad, approximately; do you know?

A. Approximately 2,570 miles.

Cross-examination by Mr. DOHERTY:

Q. You say that in order to compete with other roads you are compelled to take time to couple up the air hose?

A. On westbound merchandise business we have had occasions where——

Q. [Interrupting.] Just answer yes or no. You say you can not compete with other roads on certain kinds of freight if you couple up the hose?

WITNESS. I will have to qualify that answer if I say yes or no.

Mr. DOHERTY. Give us your answer.

A. No.

Q. You can not compete?

A. No.

123 Q. Now, isn't it a fact that the railroads directly about your road's terminals have for several years engaged in the practice of coupling up the air hose?

Mr. HOBART. That is objected to as immaterial.

The COURT. That might be competent after evidence has been introduced that other railroads had the same congestion the Erie has—they may have ample room for coupling.

Mr. HOBART. That is just the point.

The COURT. So far as appears, there is nothing shown here that these other roads have not ample room for handling anything.

Q. Well, these roads enter Jersey City under substantially the same conditions as the Erie, do they not?

A. I don't think so.

Q. In what respect are they different?

Mr. HOBART. What railroads?

Mr. DOHERTY. Take the Pennsylvania and the Lackawanna, those two that hem you in.

A. The D., L. & W., from what I have seen, they enter Jersey City on their main-line passenger tracks into their main tracks into their main yard at Hoboken; they don't enter Jersey City.

Q. They haven't freight tracks into Jersey City?

A. No, sir.

Q. They have freight going into Jersey City, have they not?

A. I understand so.

Q. Do they handle it from one terminal?

A. They have two tunnels.

Q. And they handle these trains between the tunnels, and don't you know they couple up the air hose?

A. I don't know that.

124 Q. Hasn't your road been doing it for two years?

A. As I have explained——

Q. [Interrupting.] Answer the question; hasn't your road been doing it for two years?

The COURT. He can answer "Yes" or "No" and explain after.

A. We have been coupling up the air, excepting on very few occasions.

Q. As a general rule you have coupled up the transfer trains?

A. As a general rule we have coupled up these drags of cars.

Q. And you have done it with increased business over two years ago?

A. I haven't the figures and am unable to say what the business was at that time.

Q. Now, you said something about agreements with brotherhoods and a lot of matters along that line. I want to ask you if you don't know that the Erie Railroad Company was one of those which recently arbitrated the question of the pay of engineers with the board selected by the brotherhoods and the railroads, and that the question of distinction between transfer service and switching service was not put before that commission for its decision?

Mr. HOBART. That is objected to as immaterial.

The COURT. I do not understand your question. If I recollect, the witness was asked with reference to switching service and service on the main line.

Mr. DOHERTY. Yes.

The COURT. Is that what you are talking about?

125 Mr. DOHERTY. I want to show that there are three recognized lines of service in questions of this kind—road service, transfer service (work of this character), and switching service.

The COURT. Proceed.

Mr. HOBART. I object on the ground that it is immaterial, on counsel's own statement.

The COURT. It may prove material.

Mr. HOBART. I object to it as immaterial, on the ground that it has nothing to do with the case, is a matter that took place a long time after the time in question, and has no relation to the subject matter in controversy.

(After argument.)

The COURT. Was that matter taken up prior to the committing of these offences?

Mr. DOHERTY. Not at all. But here we are discussing whether certain service is road service, transfer service, or switching service. I want to show, want to introduce evidence as to the roads having a grievance with the brotherhoods, that the brotherhoods and railroads submitted to the tribunal whether there were transfer service and

switching service, and whether there should be distinction in the pay.

Mr. HOBART. I submit that it has absolutely nothing to do with the case, is immaterial, and is irrelevant.

(After argument.)

The COURT. I can not see its relevancy. How does it bear on the issues? In the first place, this is cross-examination.

Mr. DOHERTY. I will ask two or three questions to lay a foundation.

126 Q. You have spoken of road service and switching service. Is there, in railroad parlance, such a service as transfer service?

Mr. HOBART. I object to that, unless the time is fixed.

The COURT. Yes or no.

WITNESS. Is it at this time—at the time these counts happened?

Mr. DOHERTY. I am asking at the present time if there are three kinds of service, namely, road service, transfer service, and switch service.

A. I understand that in a recent award by an arbitration committee that there were three different services mentioned—that is, switching service, transfer service, and road service.

Q. Now, I want to ask you to look at that document [indicating], board of arbitration, and read the first two lines, what he says about through-line or transfer service.

Mr. HOBART. That is objected to as irrelevant and immaterial, for the reasons already stated.

The COURT. What is the date of it?

Mr. DOHERTY. August 2, 1912.

The COURT. And the date of these offences was?

Mr. DOHERTY. January, 1911.

The COURT. A year later?

Mr. DOHERTY. A year later.

The COURT. I think it is entirely too remote. I will sustain the objection, granting an exception to the Government.

Let the exception be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

127 Mr. DOHERTY. My offer is to show that this board made a finding, which I will not repeat in the presence of the jury. (Hands a document to the court.)

The COURT. It has already been stated to the jury.

Mr. DOHERTY. My purpose is to show that there is a recognized form of railroad service differing from road service and switching service.

The COURT. What is the objection of counsel for the defendant?

Mr. HOBART. My objection is that it is immaterial and irrelevant, and that, on counsel's own statement of what he intends to show, the alleged distinction occurred a year and a half after the facts in question.

The COURT. The objection is sustained, and an exception for the Government.

Let the exception be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

Q. Now, the switching is done in these places on this map marked "Yards," is it not?

A. Switching is done all over that territory. We have sidings, and so on, all along those running tracks.

Q. The switching for the making up of trains, in which cars are made up into trains, is at these three places?

A. At Bergent yards.

Q. Are any cars or trains, with an engine, made up at this point for Weehawken?

A. Cars from the bridge go there and run through to Bergen for the purpose of being classified and going forward. There is
128 no classification of any kind at Weehawken. Cars from the bridge go there are sent to our classification yard.

Q. And when cars are made up in that yard into a transfer train it is run through to Bergen without any switching being done while in transit?

A. Not in all cases; no, sir. We have trains that go through from Bergen to Weehawken and that stop along these running tracks and switch cars.

Q. Deliveries are made at sidings along these switch tracks?

A. Industrial sidings, and so on.

Q. Trains are stopped for that purpose and switching is done of some cars off these main tracks?

A. These drags of cars are stopped to place cars on different sidings and the train goes on.

Q. Without a train dispatcher?

A. They run entirely without schedule or a train master.

Q. Now, if one of those switchings at a siding should overlap the main track and the next train coming along should reach that point, would there be anything to aid the engineer in stopping that train, except the brake of the engine itself, according to your practice?

A. I don't understand your question, as it is not a main track, is not considered as such, and the speed is very slow, and if an engineer is handling it under the rules it naturally would be slow.

Q. You may run it at fifteen miles an hour, under your rules, may you not?

A. That specifies a particular engine. The rule specifies that the man must be under full control and prepare to stop. These men are all familiar——

Q. (Interrupting.) Doesn't the rule say that they may run at at fifteen miles an hour?

A. No, sir.

129 Q. Wasn't there a rule to that effect read here?

A. No, sir.

Q. That they should not exceed fifteen miles an hour?

A. That said that yard engines should not exceed fifteen miles an hour, without any engine truck. That did not specify engines on the main road.

Q. You make a distinction between these and yard engines?

A. No; these engines are yard engines. I have so testified.

Q. Then a yard engine may run fifteen miles an hour attached to these drags of cars?

A. You evidently don't understand what I testified to. The yard rule says that in moving through a yard he must be under full control and prepared to stop short of obstruction. Another rule says that these engines must not exceed a speed of fifteen miles per hour. That rule is not intended to cover that when the engine is running along the main track; she has rights running by train orders. The engine has an engine truck. An engine truck is placed there for guiding the driving wheels. That rule was placed there to govern exclusive speed on the road or other places.

Q. [Indicating on the map.] Let's take out here; there are block signals or operators at either end of the tunnels.

A. They are not operators.

Q. Will you tell us what they are?

A. Towermen.

Q. What are those towermen?

A. Those towermen are placed there to block main-line passenger trains, which cross over the main tracks, at the west
130 end, and at the east end they are there to block trains through this tunnel. [Indicating.]

Q. These and other trains?

A. Block these drags of cars and other trains that go through the tunnel. The tunnel is very dark and we want to know that no trains are——

Q. [Interrupting.] Then these trains are out on the line where there is in operation some kind of block signaling for the crossing of a passenger track and to guide these trains in entering the tunnel?

A. There's a block signal maintained at each side of the tunnel, but not at any other part of these running tracks through to Weehawken or Jersey City, simply to guide these trains through the tunnel.

Q. Passenger trains cross these tracks?

A. Passenger trains cross these two running tracks west of the west portal of the tunnel.

Q. Do they cross at grade?

A. They cross at grade, yes, sir.

Q. Are they the passenger tracks of the railroad?

A. Yes, sir.

Q. Do you know how many trains a day pass over those passenger tracks?

A. Why, I can not say; approximately 35 or so.

Q. What is the purpose of having the air coupled up on road trains, as you understand it?

A. The purpose of having the air coupled up on road trains, as I understand it, is that they run at a high rate of speed and should be able to stop within reasonable time.

Q. It is to prevent collision, isn't it?

A. That is, on the road, outside of the yard, the rules provide they can run at a high rate of speed.

Q. It is to prevent collision, isn't it?

131 A. Why, it serves, in a measure, to—to—to do that, but we have a block signal system along the Erie Railroad—don't get that close.

Q. Now, do you know how many men on trains in this country have been killed during the present year by falling from cars—employees of railroads?

A. I do not.

Q. You see the difficulty about the handling of freight and the delivery of freight, but you don't know as to the safety side of this question?

A. Our records will indicate, on the safety side, that there have been very few men in the Jersey City terminal yards of the Erie that have been killed by falling from cars in the yard. I think our comparison would be very much better than any other railroad in that locality.

Q. You have definite information on that subject?

A. No, sir, not definite information.

Q. Don't you know that in January of any year there is danger in men riding upon the tops of cars through tunnels and in any place in this climate at that time of the year?

A. There is danger in men riding on the tops of cars at any time.

Q. What were the flags and lanterns furnished to these men for, on the ends of these trains?

A. The rules provide that at night there must be a red lantern on every engine. That includes switch engine and road engine. The men have a white light for signaling purposes and so on. By day they carry a green flag on the hind end of the train, in no designated part, to indicate to the towerman at each side of each end of the tunnel that this drag of cars has come through the tunnel intact. The red lantern is carried through the day time for emergency purposes passing through the tunnel.

132 Q. Does that practice prevail, to use a flag and lantern by day on all railroads that operate tunnels?

A. On another railroad—we will say the Lackawanna Railroad—they have a tunnel sheet for slacking down. If they should run a train through their tunnel the bearing lights would be displayed. Then we have a light on each side of the rear and on the rear car of the train, showing red to the rear and green to the side and front. Then we also have to have at least one or two lighted lamps in the caboose for flagging purposes. They have these lamps on the rear side of the rear of each car, as markers designating the rear of the

train, but have no bearing flags for flagging purposes. That is not our practice.

Q. Is it a fact that you don't apply your tunnel markers so as to sustain your contention that that is not a train?

A. I don't understand your question.

Q Can you tell us any reason why you don't, in train movements there, have tunnel markers, adopting the rule that you say applies on other railroads?

A. Our regular trains or freight trains passing through tunnels on the line have the same rules as apply on the Lackawanna.

Q. And you have these particular markers instead of other markers on these trains?

A. We have these—we use these signals, as I have already explained.

Q. Nobody can find a rule on the subject?

A. It isn't necessary to have designated rules for operating switching engines in yards. The rules that govern trains on the road are covered by the block signal.

Q. You have no rules providing for the use of markers in tunnels in such a place as this?

133 A. These men have their order. I don't know what time the order was issued, but it has been in practice a long time.

Q. Is there any written order on the subject?

A. There is a written order to carry a road lantern through that tunnel for terminal purposes.

Q. Did you ever see that order?

A. Yes, sir.

Q. When was it issued?

A. I couldn't tell you.

Q. How many years ago?

A. The order has been issued from time to time.

Q. This one you are talking about?

A. I couldn't tell you the date of the order.

Q. How long ago?

A. I couldn't tell approximately.

Q. When was it you saw it?

A. I saw it on different occasions while I was yardmaster.

Q. Where?

A. On the bulletin board in the yard at Bergen.

Q. And what did it say?

A. As I recollect, the order read that a red lamp be carried on the rear end of the train, or on the train at the rear end, for emergency purposes, passing through the tunnel; in the daytime a green flag should be carried, to show the towermen that these drags of cars passed through this tunnel intact.

Q. The book of rules says for the purpose of indicating the end of the train.

A. To indicate the rear of the train, there's a designation of markers on each side of the rear of the train.

Q. So that the towermen may know that the train has passed through intact?

134 A. So that the towermen may know that the train has passed through intact; that they don't leave a part of the train in the tunnel.

Q. That's the purpose of markers?

A. The purpose of markers is to show that the train passes along intact on the railroad.

Q. How many extra men has it taken to do this work of coupling up the hose?

A. To give you an idea how much the cost is——

Q. [Interrupting.] Give us an idea of how much the cost is.

A. We figure entirely by engines.

Q. How many extra men would it require?

A. You can figure on about five men to an engine—the engineer, the fireman, the yard conductor, and two brakemen—I should say, under the conditions last September and October.

Q. You don't understand me. I don't mean the volume of traffic; I mean how many extra men has it taken to couple up the air hose?

A. I wouldn't testify as to how many men.

Q. You are in charge?

A. I am in charge of the operation; I am not in charge of that particular line of work.

Q. Can you give us any idea of how many extra men it has taken to do the work at any of these yards? Not more than two, has it?

A. It has taken at Bergen——

Q. [Interrupting.] I mean at Jersey City and Weehawken.

A. I don't know how many it has taken at Jersey City and Weehawken.

Q. More than two?

A. They have more than two there, I am sure.

Q. More than two extra men you think they have there?

135 A. Yes, sir.

Redirect examination by Mr. HOBART:

Q. How many extra men at Bergen?

A. They have five or six more.

Q. Five or six more?

A. Yes.

Q. Mr. Doherty spoke about coupling up. Does that include testing up?

A. No, sir; mere coupling up without regard to whether they fit or not.

Q. You spoke of tracks at the west end of the tunnel. What division is that?

A. That is what we call the Northern Railroad Division.

Q. That's one division out of seven?

A. That's one division out of seven.

Q. How many divisions are there altogether?

A. About seven.

Q. One out of seven divisions has to pass over the freight tracks in order to proceed on its way toward its various stations?

A. Yes, sir.

Q. Do any of the others—did they at that time—cross these freight tracks?

A. No; just the Northern Division.

Q. Is that crossing protected—was it protected by block signals?

A. By block signals.

Q. If there was none of these trains or drags of cars to pass through there, would there be any need of a red light there at all?

A. Not in the daytime; no, sir.

(Defendant rests.)

136 The COURT. Has the defendant any requests for instructions?

Mr. HOBART. I haven't any prepared yet. I haven't over one or two, which I will hand up if the case goes over until to-morrow.

The COURT. Is there any rebuttal?

Mr. DOHERTY. No, sir.

Mr. HOBART. If the court please, I will ask that a verdict be directed in favor of the defendant as to all of the counts in question. I place the motion upon the ground that there is no disputed question of fact to go to the jury, and that, under the interpretation this statute as announced by the Circuit Court of Appeals for this circuit, the movement of these drags of cars was not a movement of a train within the meaning of the statute.

(After argument.)

Mr. HOBART. Counsel suggested that there might be a question of fact as to whether or not these were all one yard. I submit that that is a question of law. No one denies the defendant's witnesses as to what the conditions were, and we do not deny the Government's evidence as to what they found. It is claimed to be a question of fact as to whether these movements—I am referring to the air brakes cases more particularly—were trains, but there isn't any dispute about the number of cars, the rate of speed, the distance they went, what they did, and the reason why they did it. All of the facts are developed most fully, and there being no dispute, how can there be any question of fact for the jury to pass on as to whether each drag was a train? It seems to me that the necessary inference, the duty on the part of the court is to decide the matter as a matter of law, especially in light of the decision of the Circuit Court of Ap-

137 peals. It was further suggested that there may be a question of fact as to whether each of the movements in question was a switching movement. There again we have no question of fact as to how it was done or why it was done. So that we get back to the fundamental question, that where there is no dispute of fact the case is for the court. When this case was tried before, the court directed a verdict for the Government, and the evidence submitted here is not

any different substantially; the case has been brought out a little more fully, but there is no dispute; everybody agrees what was done and the way the thing was handled; therefore, there being no disputed question of fact, I respectfully submit that we are entitled to a verdict in favor of the defendant.

The COURT. On the question as to whether there is any dispute of fact and what is the duty of the court, is it the duty of the court to pass upon all the inferences that may be drawn from the facts testified to by the witnesses?

Mr. HOBART. When only one inference can be drawn.

The COURT. That is the question, of course, in the case, as to whether there may be a number of inferences drawn from all the surrounding conditions. Of course, where there is a plain set of facts testified to without contradiction and from which no variety of inferences can be drawn, then it may be the duty of the court to take the case from the jury; but where there are inferences of different kinds that might be drawn, it is a question if it should not be left to the jury.

Mr. HOBART. I have striven in this case to make it a test case, to have no disputed facts, and I think we have succeeded pretty well. We have stipulated all we could, and the evidence we have brought out on either side is not contradicted as to the kind of train,
138 the kind of markers, the rules of the company, and everything of that kind. Everything is perfectly plain and open; no attempt to conceal anything; it is all here for whatever it may be worth. Just where would it leave us if it should be said that there is a question of fact? Here are eighteen separate counts. Suppose for the moment that the Government tried one count at a time as a separate case. There would be eighteen different cases, and the evidence would be the same as now presented, because it could not be any different; and it may be that one day a jury might find for the Government, and the next day another jury find for the defendant, and the next day again another jury find for the Government, and so on. Take this case, again; suppose the Government feels under obligation to bring further prosecution under this statute to-morrow or the next day. The conditions are substantially the same as they are now. We don't know whether to defend; we don't know what to think.

The COURT. Isn't there a suggestion in the Circuit Court of Appeals that there may be a question for the jury (I am not saying there is) as to whether the Bergen, Jersey City, and Weehawken yards, together, were not in fact a single shifting yard, and the car movements in and between these different points or yards switching operations? Now, isn't that really what the Court of Appeals said should be left to the jury? Would not that settle all prosecutions; would not that settle all proceedings of a similar nature if there was a submission to the jury and a finding of fact between the parties?

Mr. HOBART. The trouble is that a jury to-morrow might find differently.

The COURT. You have no right to suppose that the question
139 is squarely submitted to the jury as to whether those yards, together, were not a single shifting yard and these movements switching movements.

Mr. HOBART. In the opinion of the Circuit Court of Appeals there was no occasion for the court to decide whether or not a verdict should have been directed for the defendant. A motion similar to this was made in that case. All the court does pass upon is that there should not have been a verdict directed for the Government; but it did not pass upon the question fairly as to whether there might or might not have been a verdict for the defendant, except as it indirectly expressed its opinion very positively that there was no question of fact, as here, for example. (Reads from the opinion referred to.) That is what we have here. There is no evidence that these drags of cars were finally made up for road trains. I respectfully submit that under the evidence as it stands, and under the effort that has been made to bring the matter squarely before the court, we are entitled to a direction on this very point.

The COURT. Mr. Doherty, is there any dispute here as to the facts?

Mr. DOHERTY. As to the inferences to be drawn from the facts, there is a dispute. There is a dispute, also, as to the question of whether or not the yards here are one yard or three years.

The COURT. Well, yes; that is a dispute.

Mr. DOHERTY. Also a dispute upon the question, Was this a switching movement? We contend that the Circuit Court of Appeals squarely intended that that question should go to the jury. It is a fair inference from that opinion that that question should go to the jury, and upon that we think we are entitled to go to the jury.

140 The COURT. Let me ask you again, Mr. Doherty, is there any evidence that these tracks through the tunnel are part of the main line?

Mr. DOHERTY. Yes, your honor, an abundance of it. Here it is stated in the stipulation that over these same tracks important freight trains, local and through, to the number, I think, of twenty-four, passed over part of these same tracks that were in use by the trains making these movements.

Mr. HOBART. Yes; that part of the road passes through the tunnel.

Mr. DOHERTY. So that it may be part of the highway for interstate commerce.

Mr. HOBART. How about the cars being made up for train service?

The COURT. It is a question whether the Government or the plaintiff shall be deprived of the inference that may be drawn by the jury from the facts. That is what was in my mind. It is now about time for adjournment. We will take up this matter in the morning.

At this point the court adjourned until Wednesday, February 19, at 10.30 o'clock a. m.

141 SECOND DAY.

WEDNESDAY, *February 19, 1913.*

The court met pursuant to adjournment February 18th, at 10.30 o'clock a. m.

Appearances as before noted.

The COURT. Proceed, gentlemen.

Mr. HOBART. If your honor pleases, there was one matter incident to the testimony which was overlooked yesterday, and Mr. Doherty agrees that I might reopen the case to put it in.

It is stipulated that it would take about twenty to thirty minutes to couple up the air hose; that is, coupling up as distinguished from coupling and testing.

(After argument.)

The plaintiff requests the court to make each of the following rulings:

1. That in the cases for violation for the safety-appliance law, the provisions of the act of April 14, 1910, are not applicable for the reason that the occurrences alleged in the plaintiff's petition were before the passage of said act and said act is not retroactive.

2. That the movement of the cars defective as to safety appliances shown by the stipulation and the evidence was a use of said cars in violation of the law.

3. That if the jury find that the yard at Weehawken and Jersey City each had its own distinct limits within which switching was done, and that a transfer train classified and made up in that yard was hauled for a distance of from two to three and a half miles to
142 another yard at Bergen without any switching or interference with the make-up of said transfer train during such transfer movement, and that cars in said train were loaded with interstate commerce proceeding over the main tracks towards its destination, it is the duty of the jury to find a verdict for the plaintiff.

4. That the danger to the men engaged in moving the cars in question made up into transfer trains and the danger to interstate traffic itself were as imminent in movements such as are disclosed by the evidence as the danger in movements on the "road."

5. That by the language used in the act, Congress intended that engineers should be able to "control the speed" and bring quickly to a standstill a train moving slowly through a congested region of tracks intersected by switches and through tunnels, as well as to a train moving rapidly on a single clear track in the open country.

6. That the men who operate and work about interstate cars made up into transfer trains moving on the main tracks of a railroad in the completion of their interstate journey are wholly within the protection of the safety-appliance act until their interstate journey is completed.

7. That the air-brake provision of the safety-appliance act is for the protection not alone of brakemen but of all other employees, whether specifically known as conductors, brakemen, or yard foremen

or switchmen, whose duties in connection with any train would oblige them to use the common hand brakes in the absence of air brakes.

8. That the safety-appliance law applies to the handling of trains on the main line of an interstate railroad by transfer crews to the same extent as if such trains were operated by regular road crews.

143 9. That there is no exception in the act to relieve a railroad from the obligation to use and operate the air brakes on any train hauled upon the main lines of an interstate railroad.

10. That the necessity for efficient and operative air brakes exists at all times and under all circumstances where any train of cars is hauled on an interstate railroad and the obligation to comply therewith is absolute.

11. That the purpose of Congress in the enactment of the air-brake provision of the safety-appliance law was to prevent sending employees upon the tops of cars to operate hand brakes and to substitute in the place of the practice prevailing before the passage of the act an efficient train-brake system operated by the engineer.

12. That the movement of trains, whether road trains or transfer trains, for material distances over the main line of an interstate railroad with the train-brake system rendered inoperative by the disconnection of the air hose between the cars, so that a necessity exists for employees, whether brakemen or switchmen, to go upon the tops of the cars to operate hand brakes, is a violation of the act.

13. That if the jury find that during the movement shown by the stipulation and the evidence no switching was done and that the train moved for miles without interference with its make-up, it is their duty to find that such movements were not switching movements.

14. That if the jury find that the movements in question were not switching movements; that is, were not movements in which cars were added to or taken from said trains, it is their duty to find for the plaintiff.

144 The COURT. (Orr, district judge.) I have considered this case very carefully and was at first inclined to submit a question of fact to the jury, on the theory that the plaintiff had made out a prima facie case, in its testimony and under the stipulation, and that perhaps there was a question as to whether that prima facie case had been met by the defendant and overcome. But I believe that the trial judge is more than a presiding officer, and I am satisfied, from the evidence in the case, that there is no dispute of fact. There is a dispute as to expression of opinion on the part of the witnesses, but no dispute as to the facts in the case. It is, therefore, my duty to instruct the jury to find a verdict for the defendant. My reasons for doing so I, perhaps, should express.

This is an action by the United States against the Erie Railroad Company, to recover penalties for violations of what is known as the "Safety-appliance act" of Congress and the several supplements thereto. There are twenty-six counts or charges of violation. The

first eight counts relate to the absence from certain cars of specific appliances and the use of those cars without such specific appliances. It is unnecessary for me to go into details of that matter.

The first eight counts cover cars that were required to be repaired, and the evidence shows that it was reasonably necessary and proper that those cars should be taken to the nearest repair shop for that purpose, or placed upon a repair track or in some convenient place where the repairs could be made. The remaining counts charge the movement of trains without having the required number of cars coupled together with air brakes, so that they could be controlled by the engineer by means of air.

It has been held by the courts that these requirements of the
145 safety-appliance act are not obligatory in shifting movements in a yard. If they were, the mere movement of a car without the required appliances, in a yard, would be a violation of the act; and the mere movement of a train, in shifting, without the coupling of the cars together with the air-brake appliance, so that the required number of cars were so coupled, would be a violation of the act. But, as I have said, the act does not require these appliances in a terminal yard where shifting is done.

The evidence in this case appears to me to be undisputed that the railroad company receives cars at Jersey City, receives cars at Weehawken, and receives cars at Bergen. The evidence discloses the fact that cars—many of them—are received at Jersey City from lighters, and also at Weehawken, and that those cars must be removed quickly, to make room for others that may be coming. There is an abundance of evidence, that is uncontradicted, as to the great number of cars that are received and handled at these points. The evidence is uncontradicted that at Jersey City the defendant railroad company is hemmed in by the Pennsylvania Railroad and by other conditions, so that it has there but a limited number of tracks—sixty, I think, fifty or sixty—and the evidence shows that at Weehawken, also, the defendant is hemmed in, able to have but some eighty tracks there. There is nothing strange in the railroad company extending its yards in the direction of least resistance. Of course, it can remove rock, but it is tremendous expense, perhaps, to make room where a mountain has been standing; and it appears from the evidence that the line of least resistance, least expense—and there is other resistance, because one railroad company cannot take the property of another for its own purposes—is in the direction
146 where these yards have been extended, namely, toward the Hackensack River.

The evidence shows that the movement of these trains extends from what they call the terminals, at Jersey City and Weehawken, through the tunnel, out to Bergen, where there are something like one hundred and fifteen tracks, where cars can be classified, where they can be inspected and repaired, and where the air hose may be coupled up and the aid brakes thoroughly tested, taking all the time that is necessary, before they start for their various destinations.

As I say, the facts are not disputed. This is one yard, under the evidence in the case, although separated by a mountain and connected by a tunnel, which, by the way, the evidence shows does not contain the main travel tracks of the railroad. Being one yard, therefore, under the evidence in the case, it is my duty to instruct you, gentlemen, that the railroad company is not guilty of a violation of the act in its train movements, as charged, and that your verdict must be for the defendant.

The clerk will take the verdict.

Mr. DOHERTY. I except to your honor's ruling instructing the jury to return a verdict in favor of the defendant.

The COURT. The clerk will take the exception.

Let the exception be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

Counsel for the Government pray exception:

1. To the refusal of the court to charge, as requested, that in the cases for violation of the safety-appliance law, the provisions of the act of April 14, 1910, are not applicable for the reason
147 that the occurrences alleged in the plaintiff's decision were before the passage of said act, and said act is not so retroactive.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

2. To the refusal of the court to charge, as requested, that the movement of the cars defective as to safety appliances shown by the stipulation and the evidence was a use of said cars in violation of the law.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

3. To the refusal of the court to charge, as requested, that if the jury find that the yard at Weehawken and Jersey City each had its own distinct limit within which switching was done, and that a transfer train classified and made up in that yard was hauled for a distance of from two to three and a half miles to another yard at Bergen without any switching or interference with the make-up of said transfer train during such movement, and that cars in said train were loaded with interestate commerce proceeding over the main tracks towards its destination, it is the duty of the jury to find a verdict for the plaintiff.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

4. The refusal of the court to charge, as requested, that the
148 danger to the men engaged in moving the cars in question made up into transfer trains and the danger to interstate

traffic itself were as imminent in movements such as are disclosed by the evidence as the danger in movements on the "road."

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

5. To the refusal of the court to charge, as requested, that by the language used in the act, Congress intended that engineers should be able to "control the speed" and bring quickly to a standstill a train moving slowly through a congested region of tracks intersected by switches and through tunnels, as well as to a train moving rapidly on a single clear track in the open country.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

6. To the refusal of the court to charge, as requested, that the men who operate and work about interstate cars made up into transfer trains moving on the main tracks of a railroad in the completion of their interstate journey are wholly within the protection of the safety-appliance act until their interstate journey is completed.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

7. To the refusal of the court to charge, as requested, that
149 the air brake provision of the safety-appliance act is for the protection not alone of brakemen but of all other employees whether specifically known as conductors, brakemen or yard foremen or switchmen, whose duties in connection with any train would oblige them to use common hand brakes in the absence of air brakes.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

8. To the refusal of the court to charge, as requested, that the safety-appliance law applies to the handling of trains on the main line of an interstate railroad by transfer crews to the same extent as if such trains were operated by regular road crews.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

9. To the refusal of the court to charge, as requested, that there is no exception in the act to relieve a railroad from the obligation to use and operate air brakes on any train hauled upon the main lines of an interstate railroad.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

10. To the refusal of the court to charge, as requested, that the necessity for efficient and operated air brakes exists at all times and under all circumstances where any train of cars is hauled on an interstate railroad and the obligation to comply therewith is absolute.

150 Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

11. To the refusal of the court to charge, as requested, that the purpose of Congress in the enactment of the air-brake provision of the safety-appliance law was to prevent sending employees upon the tops of cars to operate hand brakes and to substitute in the place of the practice prevailing before the passage of the act an efficient train-brake system operated by the engineer.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

12. To the refusal of the court to charge, as requested, that the movement of trains, whether road trains or transfer trains, for material distances over the main line of an interstate railroad with the train-brake system rendered inoperative by the disconnection of the air hose between the cars, so that a necessity exists for employees, whether brakemen or switchmen, to go upon the tops of the cars to operate hand brakes is a violation of the act.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

13. To the refusal of the court to charge, as requested, that if the jury find that during the movements shown by the stipulation and the evidence, no switching was done and that the train moved

151 for miles without interference with its make-up, it is their duty to find that such movements were not switching movements.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

14. To the refusal of the court to charge, as requested, that if the jury find that the movements in question were not switching movements; that is, were not movements in which cars were added to or taken from said trains, it is their duty to find for the plaintiff.

Exception allowed; let it be sealed, and it is sealed accordingly.

CHAS. P. ORR, [L. S.]
Judge.

152 In the District Court of the United States for the District of New Jersey.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Assignments of error.

(Filed April 7, 1913.)

Comes now the above-named plaintiff, United States of America, and in connection with its petition for a writ of error, makes the following assignments of error which it avers were committed by the court in the trial of this cause and upon which it will rely in its prosecution of the writ of error in the above-entitled cause to the United States Circuit Court of Appeals for the Third Circuit:

First. The court erred in that the trial judge permitted the following question to be asked John J. Mantell, a witness for the defendant, on his direct examination: "And is that the kind of signals or markers that was used on your regular trains in January, 1911?"

Second. The court erred in refusing to give the plaintiff's requested instruction number one, to the effect that in the cases for
153 violation of the safety-appliance law, the provisions of the act of April 14, 1910, are not applicable for the reason that the occurrences alleged in the plaintiff's petition were before passage of said act, and said act is not retroactive.

Third. The court erred in refusing to give the plaintiff's requested instruction number two, to the effect that the movement of the cars defective as to safety appliances shown by the stipulation and the evidence was a use of said cars in violation of the law.

Fourth. The court erred in refusing to give the plaintiff's requested instruction numbered three, to the effect that if the jury find that the yard at Weehawken or Jersey City had its distinct limit within which switching was done, and that a transfer train classified and made up in that yard was hauled for a distance of one and one-half to three miles to another yard at Bergen without any switching or interference with the make-up of said transfer train during such transfer movement, and that cars in said train were loaded with interstate commerce proceeding over the main tracks towards their destination, it is the duty of the jury to find a verdict for the plaintiff.

Fifth. The court erred in refusing to give the plaintiff's requested instruction numbered four, to the effect that the danger to the men engaged in moving the cars in question made up into transfer trains and the danger to interstate traffic itself were as imminent in movements such as are disclosed by the evidence as the danger in movements on the "road."

Sixth. The court erred in refusing to give the plaintiff's requested instruction numbered five, to the effect that by the language used in the act Congress intended that engineers should be able to "control the speed" and bring quickly to a standstill a train moving slowly through a congested region of tracks intersected by switches and through tunnels, as well as to a train moving rapidly on a single clear track in the open country.

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Seventh. The court erred in refusing to give the plaintiff's requested instruction numbered 6, to the effect that the men who operate and work about interstate cars made up into transfer trains moving on the main tracks of a railroad in the completion of their interstate journey are wholly within the protection of the safety-appliance act until their interstate journey is completed.

Eighth. The court erred in refusing to give the plaintiff's requested instruction numbered 7, to the effect that the air-brake provision of the safety-appliance act is for the protection not alone of brakemen, but of all other employees, whether specifically known as conductors, brakemen, or yard foremen, or switchmen, whose duties in connection with any train would oblige them to use the common hand brakes in the absence of air brakes.

Ninth. The court erred in refusing to give the plaintiff's requested instruction numbered eight, to the effect that the safety-appliance law applies to the handling of trains on the main line of an interstate railroad by transfer crews to the same extent as if such trains were operated by regular road crews.

Tenth. The court erred in refusing to give the plaintiff's requested instruction numbered nine, to the effect that there is no exception in the act to relieve a railroad from the obligation to use and operate the air brakes on any train hauled upon the main lines of an interstate railroad.

Eleventh. The court erred in refusing to give the plaintiff's requested instruction numbered ten, to the effect that the necessity for efficient and operative air brakes exists at all times and under all circumstances where any train of cars is handled on an interstate railroad and the obligation to comply therewith is absolute.

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Twelfth. The court erred in refusing to give the plaintiff's requested instruction numbered eleven, to the effect that the purpose of Congress in the enactment of the air-brake provision of the safety-appliance law was to prevent sending employees upon the tops of cars to operate hand brakes and to substitute in the place of the practice prevailing before the passage of the act an efficient train-brake system operated by the engineer.

Thirteenth. The court erred in refusing to give the plaintiff's requested instruction numbered twelve, to the effect that the movement of trains, whether road trains or transfer trains, for material distances over the main line of an interstate railroad with the train-brake system rendered inoperative by the disconnection of the air hose between the cars, so that a necessity exists for employees, whether

brakemen or switchmen, to go upon the tops of the cars to operate hand brakes, is a violation of the act.

Fourteenth. The court erred in refusing to give the plaintiff's requested instruction numbered thirteen, to the effect that if the jury find that during the movement shown by the stipulation and the evidence no switching was done and that the train moved for miles without interference with its make-up, it is their duty to find that such movements were not switching movements.

Fifteenth. The court erred in refusing to give the plaintiff's requested instruction numbered fourteen, to the effect that if the
156 jury find that the movements in question were not switch movements—that is, were not movements in which cars were added or taken from said trains—it is their duty to find for the plaintiff.

Sixteenth. The court erred in giving a preemptory instruction to the jury to find a verdict for the defendant.

Wherefore, the plaintiff prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that the said court be directed to set aside the judgment heretofore entered in defendant's favor, and that the cause be remanded for a new trial.

JOHN B. VREELAND,
United States Attorney.
PHILIP J. DOHERTY,
Special Assistant United States Attorney.

157 United States District Court, District of New Jersey.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Petition for writ of error.

(Filed April 7, 1913.)

The United States of America, the plaintiff in the above cause, feeling itself aggrieved by the verdict of the jury and the judgment entered thereon on the 29th day of March, nineteen hundred and thirteen, comes, by John B. Vreeland, United States attorney, its attorney, and petitions the court for an order allowing the said plaintiff to prosecute a writ of error in the United States Circuit Court of Appeals for the Third Circuit, under and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this court be suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray, &c.

JOHN B. VREELAND,
United States Attorney,
Attorney for Plaintiff.

158 United States District Court, District of New Jersey.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Order allowing writ of error.

(Filed April 7, 1913.)

On the petition of the United States of America, the above-named plaintiff praying for the allowance of a writ of error in the United States Circuit Court of Appeals for the Third Circuit, it appearing to the court that the said plaintiff has filed its assignment of errors:

Ordered, that the said writ of error to the United States Circuit Court of Appeals for the Third Circuit, from the final judgment heretofore entered in the above case, be and the same is hereby allowed; and that a certified transcript of the record and all proceedings in the cause, duly authenticated, be forthwith sent to said court.

JOHN RELLSTAB, *Judge.*

Dated April 7th, 1913.

159 United States District Court, District of New Jersey.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the District of New Jersey, greeting:

Because in the record and proceedings and also in the rendition of the judgment on ———, nineteen hundred and thirteen, of a plea which was in the said district court, before you, between United States of America, plaintiff, and Erie Railroad Company, defendant, manifest error hath happened to the great damage of the said United States, plaintiff in error, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in its behalf—

Do command you, that if judgment be therein given, you send under your seal, distinctly and openly, the record and proceedings aforesaid, with all things concerning the same, together with
160 this writ in the said United States Circuit Court of Appeals for the Third Circuit, so that you have the same at the city of

Philadelphia, in the State of Pennsylvania, on the 5th day of May, 1913, in the said United States Circuit Court of Appeals for the Third Circuit, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Third Circuit may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 7th day of April, in the year one thousand nine hundred and thirteen.

GEORGE T. CRANMER, [L. S.]
Clerk.

Per C. S. CHEVRIER, *Deputy Clerk.*

161 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Erie Railroad Company, greeting:

You are hereby cited and admonished to be and appear before the Circuit Court of Appeals of the United States for the Third Judicial Circuit, to be holden at Philadelphia, on the fifth day of May, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, in and for the District of New Jersey, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John Rellstab, a district judge of the United States, this 7th day of April, 1913.

JOHN RELLSTAB, *Judge.*

Service of the within citation is acknowledged this eleventh day of April, 1913.

COLLINS & CORBIN,
Attorneys of Defendants in Error.

162 United States Circuit Court of Appeals, for the Third Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
ERIE RAILROAD COMPANY, DEFENDANT IN ERROR.

Order extending time to file transcript.

Forasmuch as it has been represented to me that the time allowed by the rules of the United States Circuit Court of Appeals, for the Third Circuit, for the filing of a transcript of the record of the above-entitled cause is not sufficient to allow the clerk to conveniently prepare such transcript, and said clerk has applied to me for an

extension of said time, and because no prejudice can result from the granting of said extension:

Therefore, It is on this 5th day of May, 1913, ordered that the time limited by said rules for the filing of said transcript be and hereby is extended until the first day of August, 1913.

JOHN RELLSTAB, *Judge.*

163 EXHIBIT D. 2.

UNITED STATES VS. ERIE RAILROAD.

26 safety appliance violations.

Statement for Jersey City, Bergen, and Weehawken yards, showing cars handled in both directions, also received and delivered to connections from July 1st, 1910, to December 31, 1910.

JERSEY CITY.

(Connections.)

Month.	East.	West.	Rec'd.	Del'd.
July	15670	15845	1970	1730
August	17236	17936	1913	1785
September	17130	18031	1962	1851
October	17780	18223	1800	1782
November	16485	16581	1995	1931
December	15420	17058	1741	1797

BERGEN.

(To and from connections.)

Month.	East.	West.	Rec'd.	Del'd.
July	26802	12193	3436	2621
August	28510	13486	3521	2730
September	26584	14542	2805	2385
October	32014	16242	3971	2190
November	32076	19129	2590	1990
December	32905	17883	2457	2780

164 WEEHAWKEN.

(To and from connections.)

Month.	East.	West.	Rec'd	Del'd.
July	5309	4983	3202	3290
August	5847	5003	3337	3618
September	4810	4837	3003	2993
October	4947	5454	3142	3018
November	4500	4985	3476	3317
December	5350	5062	3612	4210

Included in cars to and from connections at Weehawken are cars handled between the West Shore R. R. and Hoboken Shore R. R., through Weehawken yard by our engines, as follows:

	Rec'd from WSRR and Del'd to HSRR	Rec'd from HSRR and Del'd to WSRR.
July	392	400
August	403	369
September	380	400
October	390	395
November	429	420
December	517	470

J. C., office supt. terminals, 10/4/12.

165 In the United States Circuit Court of Appeals for the Third Circuit.

UNITED STATES, PLAINTIFF IN ERROR, *vs.* ERIE RAILROAD COMPANY, DEFENDANT IN ERROR.	No. 1763. October term, 1913.

And afterwards, to wit, on the 17th day of October, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, circuit judges, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the second day of April, 1914, come the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises, renders the following decision:

166 In the United States Circuit Court of Appeals for the Third Circuit.

UNITED STATES OF AMERICA *vs.* ERIE RAILROAD COMPANY.	No. 1763. October Term, 1913.

In error to the District Court of the United States for the District of New Jersey.

Before Gray, Buffington, and McPherson, circuit judges.

BUFFINGTON, *Circuit Judge:*

In the court below the United States, by eighteen counts, charged the Erie Railroad Company with a violation of the act of Congress of March 2, 1903, which provides:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine

in moving interstate traffic not equipped with a power-driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

It will be observed that these counts do not charge the railroad with violation of that absolute duty referred to in Delk vs. St. Louis, 220 U. S., 586, of properly equipping its cars initially with statutory safety devices. What they do charge is that the railroad subsequently unlawfully used such initially properly equipped cars, in that it operated trains in interstate traffic wherein seventy-five per cent of the cars had not their air brakes connected with the engine.

167 The case has been tried twice in the court below and twice brought to this court for review. It involves the movement of freight cars in the great tidal yard terminal of the Erie Railroad Company contiguous to New York Harbor. The present writ is an effort on the part of the Government to have this court review and reverse its former decision, or in the event of our adhering to such view, to put the case in such shape that an application to review it may be made to the Supreme Court. On the first trial the lower court declined to admit testimony tending to show that the operations complained of were switching-yard movements. It further instructed the jury that the movements complained of violated the statute. On error to the entry of judgment thereon, this court, in an opinion reported at 197 Fed. Rep., 288, which opinion we by reference made part hereof, remanded the case "with permission to the court below to grant a new trial, if so moved by the Government." On the case as then presented in this court two questions arose: First, Did the act in question require, in switching operations, the coupling of air brakes? If not, a second question arose, namely, Were the car operations therein involved switching movements? The first question, which was one of statutory construction, we decided in the negative, saying:

"Giving, then, to the act that construction that it was not meant to cover bona fide switching operations, we next inquire whether the movements here in question were really switching operations of the railroad."

After discussing the proofs we then said:

"To us it seems clear that there was evidence tending to show that the whole triangle formed by the Bergen, Jersey City, and Weehawken yards constitutes a single terminal classification yard. While the distance between two of these points is over three miles, it is evident from the narrow strip of land that is left along the river from the Palisades that this wide spread of space is topographically required to permit the complicated car transfer and classification of a great railroad's terminal traffic. It is in such yards that the

great contest against inextricable confusion and freight congestion must be waged."

Indeed, the case had been tried and the evidence adduced on the theory that it turned on the definition of the word "train," and
168 it was contended that if the cars coupled together in this inter-subyard transfer could be called a train, the statute was violated, whether such transfer was really switching or not. Setting aside this contention, and pointing out what was the real question involved, we said:

"It is urged that considerable numbers of cars initially classified at the three respective points are moved on the main freight tracks to and through the tunnel and that they constitute trains, and such movement therefore falls within the wording of the statute. Of course, thirty-five cars coupled together and drawn by a locomotive make a train, for such connected cars are drawn and follow in the engine's train, but this mere word definition does not settle the question before us. It is not a wrangle over mere names, but rather whether the railroad is here doing a boda fide switching work, which the law confessedly was not meant to cover. . . . We have here a question of a great terminal located in a most congested freight center. . . . Indeed, the testimony of the Government inspector shows that practically the same terminal situation as that at Jersey City exists at Buffalo and other terminal points. We are pointed to no conditions incident to this short run which makes the use of the air brakes essential to the safety of the shifting crew. The run is a brief one. There are neither grades to encounter, stops to be made, or protracted exposure."

In the absence of testimony pertinent to the real issue involved, this court might have also said, as was done by the Circuit Court of Appeals of the Eighth Circuit in C., B. & Q. R. R. v. United States, Fed. Rep.:

"This case was tried mainly by the dictionary. We have much reasoning of counsel upon general principles. What we would have preferred would be an accurate description of the development of the terminal yards at Kansas City, the present structure of those yards, the methods of handling trains therein; the speed at which transfer trains are moved between the yards; the control over such trains afforded by the coupling up of the air upon a part of the cars only; whether in actual practice, with the air coupled up on six to ten cars, the engineer can control the speed of these transfer trains from the locomotive 'without requiring brakemen to use the common hand brakes for that purpose'; what, if any, accidents have resulted from the failure to couple up seventy-five per cent of the air; the time that would be consumed in coupling up seventy-five per cent of the air on such trains; the number of trains that are moved in the yard; the effect upon the movement of cars in such terminal yards if seventy-five per cent of the air had to be coupled up on all these strings of cars. In other words, the evidence should do all that could be done

to place the court in the same position as an experienced railroad man in judging of these transportation questions."

Feeling, however, that the Government might have such testimony to offer, we, as seen by our order, and to afford an opportunity
169 to produce the same, gave the Government leave, if it saw fit, to move for a new trial. On the second trial, however, the Government has given no testimony whatever on the question which we pointed out as a vital one in the case, namely, "whether the railroad is here doing a bona fide switching work." The only testimony bearing on the foregoing question is that of one witness, an inspector for the Interstate Commerce Commission, as follows:

"Q. Now, are you familiar with the local situation of Jersey City?

"A. Yes, sir.

"Q. What would you call the collection of tracks at Jersey City on which the cars are shifted?

"A. Classification tracks for the making up of trains.

"Q. What would you call the whole group of classification tracks there, limiting your answer to those classification tracks at Jersey City?

"A. A yard.

"Q. Is there a similar group of classification tracks at Bergen?

"A. There are.

"Q. What, among railroad men, is such a classification group of classification tracks at Bergen called?

"A. A yard.

"Q. Are you familiar with a similar group of classification tracks at Weehawken?

"A. Yes, sir.

"Q. Will the same answer apply to the designation of the group of classification tracks at Weehawken that is applied to the others?

"A. It does.

"Q. In each case it is a yard?

"A. Yes, sir.

It scarcely need be said that this testimony, as to the mere existence of three individual yards threw no light whatever on the real issue whether "the whole triangle formed by the Bergen, Jersey City, and Weehawken yards, constitutes unitedly a single terminal classification yard." Indeed, the express limitation of the question asked, "limiting your answer to those classification tracks at Jersey City," precluded the witness from giving any answer on the real issue. It would therefore seem that when the Government omitted to furnish any evidence on that issue and expressly precluded its only witness from giving any testimony upon it, it can not now justly complain that such issue was not submitted to the jury, for, as it seems to us, the situation, in view of the trial procedure, narrows itself to this: If the case had been submitted to the jury, and it had found for the Government, would the court below have been bound to set the verdict aside? The recognized test in that regard is that "When the

evidence given at the trial with all the inferences the jury could justifiably draw from it is insufficient to support a verdict
170 for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." In that regard the trial judge, in directing a verdict for the defendant, said:

"It has been held by the courts that these requirements of the safety-appliance act are not obligatory in shifting movements in a yard. If they were, the mere movement of a car without the required appliances in a yard would be a violation of the act; and the mere movement of the train, in shifting, without the coupling of the cars, together with the air-brake appliance, so that the required number of cars were so coupled, would be a violation of the act. But, as I have said, the act does not require these appliances in a terminal yard where shifting is done.

"The evidence in this case appears to me to be undisputed that the railroad company receives cars at Jersey City, receives cars at Weehawken, and receives cars at Bergen. The evidence discloses the fact that cars—many of them—are received at Jersey City from lighters and also at Weehawken, and that those cars must be removed quickly to make room for others that may be coming. There is an abundance of evidence that is uncontradicted, as to the great number of cars that are received and handled at these two points. The evidence is uncontradicted that at Jersey City the defendant railroad company is hemmed in by the Pennsylvania Railroad and by other conditions, so that it has there but a limited number of tracks—sixty, I think, fifty or sixty—and the evidence shows that at Weehawken, also, the defendant is hemmed in, able to have but some eighty tracks there. . . . The evidence shows that the movement of these trains extends from what they call the terminals at Jersey City and Weehawken, through the tunnel out to Bergen, where there are something like one hundred and fifteen tracks, where cars can be classified, where they can be inspected and repaired, and where the air hose may be coupled up and the air brakes thoroughly tested, taking all the time that is necessary, before they start for their various destinations. As I say, the facts are not disputed. This is one yard, under the evidence in the case, although separated by a mountain and connected by a tunnel, which, by the way, the evidence shows, does not contain the main traveled tracks of the railroad. Being one yard, therefore, under the evidence in the case, it is my duty to instruct you, gentlemen, that the railroad company is not guilty of a violation of the act in its train movements, as charged, and that your verdict must be for the defendant."

In view of the absence of evidence on the part of the Government, and of the undisputed facts proved by the defendant, the question whether these three yards are or are not a switching unity is not debatable. Unquestionably they are. That the cars in question were being subjected to switching classification in successive yards

171 of this system is undeniable. Courts, no more than individuals, can close their eyes to the fact that they were being moved in switching, not road, service, and that this service was continuously and uninterruptedly a switching service none the less because barriers of nature—the Hudson River and Palisades at front and rear, and the laws of man in a prior use by common carriers, north and south—necessitated part of such switching being done on one side and part on the other of the tunneled Palisades. Of the physical fact that this was a switching operation there can be no doubt. Of the legal results that flow from that physical fact there is, of course, a question, but as to the facts themselves, there is no question.

Our former decision has commended itself to the Circuit Court of Appeals at the Eighth Circuit in C., B. & Q. R. R. Co. vs. United States, supra, wherein it was said:

"The identical question which is here presented was before the Circuit Court for the Third Circuit in Erie Railroad Company vs. United States, 197 Fed. Rep., 287, and, we think, was there properly decided, notwithstanding its criticism in United States v. Pere Marquette R. R. Co., in the District Court of the United States for the Western District of Michigan, decided September 5, 1913."

We have carefully considered the case of United States v. Pere Marquette R. R. Co. referred to, but as the facts of that case are stated the legal question involved in our case, namely, whether the act of 1903 covers switching operations, was really not involved in that case. There the Wyoming yard was the switching outpost on the main line of the railroad terminating at Grand Rapids. It was two miles from the city, and while it was within the yard limits of that city, all the classification and switching incident to the distribution of incoming and the making up of outgoing trains was done in the Wyoming yard. As stated in the opinion:

"Wyoming yard and freight-house yard are both within the general yard limits of the city of Grand Rapids, but they are about two miles apart and each has its own system of switching
172 tracks. Trains passing from one yard to the other must run for the entire distance upon defendant's main line, over which its regular passenger and freight trains, as well as switching and transfer trains, are operated. This part of the main line has some minor grades and curves and crosses at grade five city streets and a street car line. All of defendant's freight trains entering Grand Rapids are taken directly to Wyoming yard and are there broken up and the cars switched and classified, some being put into outgoing trains and forwarded to their destination, while others, containing local merchandise, are switched or transferred to the freight-house yard or to some city side track to be unloaded and to have their cargoes rearranged. All outgoing freight trains are made up at and started from Wyoming yard."

It is therefore clear that the entire switching of incoming cars intended for other lines took place in the Wyoming yard and such cars never went to the city freight yard. As to the incoming local

freight, it also was classified and switched in the Wyoming yard and from there sent in over the main road to the city freight yard for unloading. The Wyoming yard was in fact the sole terminal switching yard. There and there alone classifications and interchange were made. Under these terminal conditions it could no more be contended that the subsequent transfer to the city freight yard of these already switched trains for two miles, over the main passenger and freight line of cross streets at grade and intersecting trolley tracks, was a switching operation than would be the case if the Wyoming yard were twenty-two instead of two miles distant from the city freight yard. In other words, the switching was initially and finally finished at the Wyoming yard, and the switching there, so far as the make-up of trains was concerned, was in no way affected by, dependent upon, or correlated to anything thereafter or theretofore done in the city freight yard. The track between Wyoming yard and the city freight yard was not a nexus that served to correlate two dependent yards, but was a hiatus or break between two independent yards. To us it is clear that the Wyoming terminal is wholly different from the Erie, because in the Erie we have three switching yards interdependent on each other, each supple-
173 menting and each necessary to complete the partial switching done in the other, and all forming a unitary combination switching system topographically indispensable to the handling of incoming and outgoing trains.

It is, however, contended that our former decision overlooked and disregarded the effect of the act of 1903 and that it is in conflict with the decisions of the Supreme Court referred to below. It will be observed, however, that Federal air-brake legislation had in view two distinct objects, namely, first, to compel railroads to have their cars equipped with such brakes, inter alia, under all circumstances; and second, to compel the use of air-brake equipped cars under certain circumstances. These duties of air-brake equipment and air-brake use are separate and distinct. As noted at the outset of this opinion, it is this duty to equip that is referred to in Delk vs. St. Louis, 220 U. S., 586, as "an absolute duty to provide and keep proper couplers at all times and under all circumstances." The duty to equip was the subject matter involved in St. Louis v. Taylor, 210 U. S., 282; in the reaffirming case of Chicago v. United States, 220 U. S., 559; in Southern Ry. Co. v. United States, 222 U. S., 24, and in Wabash v. United States, 168 Fed. Rep., 1. It will be noted also that the act of 1893, as construed by the Supreme Court in Johnson v. Southern Pacific Co., 196 U. S., 21, was neither changed or enlarged by the act of 1903. That act was passed to meet the decision in Southern Ry. Co. vs. Johnson, 117 Fed. Rep., 462, but needlessly so, for, as said by the Supreme Court in reversing the latter case, "the latter act is affirmative and in effect only construed and applied the former act." It would seem, therefore, that none of these cases involved the question here involved, namely, the compulsory use of air-brake equipment in switching operations On that question—which is

one of statute construction—we hold the act does not compel the
174 air coupling of cars in switching movements. We so hold, amongst others, for these reasons: First, because had Congress meant to compel air-coupled switching, it would have said so; second, by providing automatic coupling Congress had already provided as far as it could against the avoidable dangers incident to switching; third, if the law includes switching it covers all switching without limitation or exception, an impracticable and impossible thing; fourth, if the act covered switching and Congress meant to except any switching therefrom, it neither did or by language made it possible to now decide what switching was excepted. Indeed, a careful study of this act shows the use in the statute of terms and words which in common use are applied to road, as contrasted with switching, operations. The act deals first with the locomotive alone as distinguished from the train. It makes it unlawful for the railroad to "use on its line"—and line, main line, is a word which in the common speech of railroad work distinguishes the line of the road from switches and terminal yards. But the act proceeds, "to use on its line any locomotive engine in moving interstate traffic." Surely the words, "in moving interstate traffic" in connection with the use of a locomotive on its line, is aptly applied to draft of trains in their transit between States. But the act proceeds, the locomotive "on its line" which is "moving interstate traffic" must be equipped with "appliances for operating the train-brake system." Surely these words, "Operating the train-brake system," mean that the system, the train-brake system, operated by the locomotive "on its line" and in "moving interstate traffic," refers to a running, rather than a switching, movement. And the further words of the statute, which make it unlawful for the road "to run any such train in such traffic . . . that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requir-
175 ing brakemen to use the common hand brake for that purpose," are words that aptly describe train movement. The operation of "the locomotive drawing such train" is in marked contrast to the push and pull of a switching engine, and "control its speed" refers to a train that is speeding, for the appliances must be such that "the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." All these terms and words of railroad parlance are applicable to line travel and fitly descriptive thereof. In railroad, "line" is contrasted with "switch," "yard," and "terminal"; main line, branch line, with switches. A "locomotive drawing such train" is in contrast with the push and pull of a yard switching engine. And not only is this the common and practical meaning of the words, but when the practical operative consequence of giving these words the meaning here contended for are considered, the unwisdom of such construction is apparent.

As well said by Judge Amidon in the Eighth Circuit case quoted above, "the attempt is made to deduce the decision of the case from the definition of the word 'train' by a process of abstract reasoning. One fundamental trouble with such reasoning is that it proves too much. The word 'train' of course covers any string of cars hauled by an engine. But if the statute is to be applied to all trains falling within this definition, then it would cover all movements of cars by means of a locomotive in switching operations, and it would make no difference whether that movement was on a main track or a siding. Such a result reduces the reasoning to an absolute absurdity, because its application to railroads would operate as an embargo on commerce." That it would be an unworkable embargo on terminal operations is a conclusion justified by the proofs in this record. These proofs show that in the air coupling of trains such as covered by the present indictments to make the switch movement through the tunnel and between the Bergen, Jersey City, and
176 Weehawken subyards, would require a delay of one hour and twenty-five minutes in the movement of each train. In this connection we pass by as untenable the contention of the Government that part of the delay might be avoided by dispensing with testing; that the Government officers would be satisfied with coupling. We can not accede to this, and we think, on mature reflection, it would not be pressed. It suffices to say that if Congress meant that cars were to be air coupled while being switched it did not intend to relieve the railroad from a thorough inspection of such couplings before they were used. It would not only be negligence for the company to fail to so inspect, but the manifest injustice of leading men to place reliance on the efficiency of untested appliances borders so near on positive and misleading wrong that we dismiss such contention without further discussion. We hold that air coupling in switching was not included in the statute. If we are wrong in that, if air-coupled switching is the statutory duty, then there must go with it such preliminary tests of such appliances as will insure their fitness to fulfill the statutory purposes in view, namely, that the engineer on the locomotive drawing such train be able to control its speed without requiring brakemen to use the common hand brake for that purpose. To forego inspection and the time needed therefor is not to be countenanced. The mere fact that the cars in these terminals come from other systems whose standards of maintenance differ, would of itself require a more careful and thorough test and inspection before the cars were subjected to the exactions of an air-coupled service.

As to the remaining eight counts we need only say, as we did in our former opinion, that as therein indicated our disposition of the main case disposes of these matters. Adhering, therefore, to our former decision, we affirm the judgment below.

(Endorsed:) No. 1763. Opinion of the court by Buffington, J. Received & filed April 2, 1914. Saunders Lewis, jr., clerk.

178 In the United States Circuit Court of Appeals for the Third Circuit.

UNITED STATES, PLAINTIFF IN ERROR, *vs.* ERIE RAILROAD COMPANY, DEFENDANT IN ERROR.	No. 1763 (List No. 31). October term, 1913.

In error to the District Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed with costs.

(Signed) JOHN B. MCPHERSON,
Circuit Judge.

PHILADELPHIA, *April 2, 1914.*

(Endorsed:) No. 1763. Order affirming judgment. Received & filed April 2, 1914. Saunders Lewis, jr., clerk.

179 United States Circuit Court of Appeals for the Third Circuit.

UNITED STATES OF AMERICA, plaintiff in error, *vs.* ERIE RAILROAD COMPANY.	Petition for writ of error.

And now comes the United States of America, by J. Warren Davis, U. S. district attorney for the District of New Jersey, its attorney herein, and says: That on or about the second day of April, 1914, the United States Circuit Court of Appeals for the Third Circuit entered an order affirming the judgment of the United States District Court for the District of New Jersey, entered March 29, 1913, which judgment was in favor of the defendant, Erie Railroad Company, and against this plaintiff, the United States of America, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will in more detail appear from the Assignment of Errors, which is filed with this petition.

Wherefore, this plaintiff prays a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the clerk of the Supreme Court of the United States.

(Signed) J. WARREN DAVIS,
United States District Attorney,
Attorney for plaintiff in error.

(Endorsed:) No. 1763. Petition for writ of error. Received & filed July 8, 1914. Saunders Lewis, jr., clerk.

(Indorsed:) 1763. United States Circuit Court of Appeals for the Third Circuit. The United States of America, plaintiff in error, vs. Erie Railroad Company, defendant in error. Petition for writ of error. J. Warren Davis, United States attorney, atty. for pltff. in error.

180 United States Circuit Court of Appeals, Third Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
ERIE RAILROAD COMPANY, DEFENDANT IN ERROR. } No. 1763.

Assignment of Errors.

Comes now the said plaintiff in error and, in connection with its petition for a writ of error, respectfully submits that in the record, decision, and final judgment of this court in the above-entitled cause there is manifest error in this, to wit:

(1) The court erred in upholding the action of the trial court in directing a verdict in favor of the defendant.

(2) The court erred in upholding the action of the trial court in its resfusal to give instruction No. 2 requested by the plaintiff, as follows:

2. That the movement of the cars defective as to safety appliances shown by the stipulation and the evidence was a use of said cars in violation of the law.

(3) The court erred in upholding the action of the trial court in its resfusal to give instruction No. 3 requested by the plaintiff, as follows:

181 3. That if the jury find that the yard at Weehawken and Jersey City each had its own distinct limits within which switching was done, and that a transfer train, classified and made up in that yard was hauled for a distance of from two to three and a half miles to another yard at Bergen without any switching or interference with the make-up of said transfer train during such transfer movement, and that cars in said train were loaded with interstate commerce proceeding over the main tracks towards its destination, it is the duty of the jury to find a verdict for the plaintiff.

(4) The court erred in upholding the action of the trial court in its refusal to give instruction No. 4, requested by the plaintiff, as follows:

4. That the danger to the men engaged in moving the cars in question made up into transfer trains and the danger to interstate traffic itself were as imminent in movements such as are disclosed by the evidence as the danger in movements on the "road."

(5) The court erred in upholding the action of the trial court in its refusal to give instruction No. 5, requested by the plaintiff, as follows:

5. That by the language used in the act, Congress intended that engineers should be able to "control the speed" and bring quickly to

a standstill a train moving slowly through a congested region of tracks intersected by switches and through tunnels, as well as to a train moving rapidly on a single clear track in the open country.

(6) The court erred in upholding the action of the trial court in its refusal to give instruction No. 6, requested by the plaintiff, as follows:

6. That the men who operate and work about interstate cars made up into transfer trains moving on the main tracks of a railroad in the completion of their interstate journey are wholly within the protection of the safety-appliance act until their interstate journey is completed.

(7) The court erred in upholding the action of the trial court in its refusal to give instruction No. 7, requested by the plaintiff, as follows:

182 7. That the air-brake provision of the safety-appliance act is for the protection not alone of brakemen, but of all other employees, whether specifically known as conductors, brakemen, or yard foremen, or switchmen, whose duties in connection with any train would oblige them to use the common hand brakes in the absence of air brakes.

(8) The court erred in upholding the action of the trial court in its refusal to give instruction No. 8, requested by the plaintiff, as follows:

8. That the safety-appliance law applies to the handling of trains on the main line of an interstate railroad by transfer crews to the same extent as if such trains were operated by regular road crews.

(9) The court erred in upholding the action of the trial court in its refusal to give instruction No. 9, requested by the plaintiff, as follows:

9. That there is no exception in the act to relieve a railroad from the obligation to use and operate the air brakes on any train hauled upon the main lines of an interstate railroad.

(10) The court erred in upholding the action of the trial court in its refusal to give instruction No. 10, requested by the plaintiff, as follows:

10. That the necessity for efficient and operative air brakes exists at all times and under all circumstances where any train of cars is hauled on an interstate railroad and the obligation to comply therewith is absolute.

(11) The court erred in upholding the action of the trial court in its refusal to give instruction No. 11, requested by the plaintiff, as follows:

11. That the purpose of Congress in the enactment of the air-brake provision of the safety-appliance law was to prevent sending employees upon the tops of cars to operate hand brakes and to substitute in the place of the practice prevailing before the passage of the act an efficient train-brake system operated by the engineer.

183 (12) The court erred in upholding the action of the trial court in its refusal to give instruction No. 12, requested by the plaintiff, as follows:

12. That the movement of trains, whether road trains or transfer trains, for material distances over the main line of an interstate railroad with the train-brake system rendered inoperative by the disconnection of the air hose between the cars, so that a necessity exists for employees, whether brakemen or switchmen, to go upon the tops of the cars to operate hand brakes, is a violation of the act.

(13) The court erred in upholding the action of the trial court in its refusal to give instruction No. 13, requested by the plaintiff, as follows:

13. That if the jury find that during the movement shown by the stipulation and evidence no switching was done and that the train moved for miles without interference with its make-up, it is their duty to find that such movements were not switching movements.

(Endorsed:) No. 1763. Assignment of errors. Received & filed July 8, 1914. Saunders Lewis, jr., clerk.

184 U. S. Circuit Court of Appeals for the Third Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
ERIE RAILROAD COMPANY, DEFENDANT IN ERROR. } Order allowing writ of error.

This seventh day of July, nineteen hundred and fourteen, comes the United States of America, by J. Warren Davis, United States district attorney, its attorney, and files herein and presents to the court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error to the said The United States of America.

(Signed) WILLIAM H. HUNT,
Judge.

(Endorsed:) No. 1763. Order allowing writ of error. Received & filed July 8, 1914. Saunders Lewis, jr., clerk.

(Indorsed:) 1763. United States Circuit Court of Appeals for the Third Circuit. The United States of America, plaintiff in error, vs. Erie Railroad Company, defendant in error. Order allowing writ of error. J. Warren Davis, United States attorney, atty. of pltff. in error.

185 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the United States Circuit Court of Appeals for the Third Circuit, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said U. S. Circuit Court of

Appeals, before you, between the United States of America and the Erie Railroad Company, a manifest error has happened to the great damage of the said the United States of America, as by its complaint appears, we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the sixth day of Aug. next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Edmund D. White, Chief Justice of the United States, the seventh day of July, in the year of our Lord one thousand nine hundred and fourteen.

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court
of Appeals for the Third Circuit.

Allowed:

WM. H. HUNT, *Circuit Judge.*

(Indorsed:) United States Circuit Court of Appeals for the Third Circuit. The United States of America, plaintiff in error, vs. The Erie Railroad Company, defendant in error. Writ of error. Returnable. J. Warren Davis, United States attorney, atty. for pltff. in error.

186 UNITED STATES OF AMERICA, *ss:*

To the Erie Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 7th day of July, in the year of our Lord one thousand nine hundred and fourteen.

WM. H. HUNT, *Circuit Judge.*

(Indorsed:) No. 1763. United States Circuit Court of Appeals for the Third Circuit. The United States of America, plaintiff in error, vs. Erie Railroad Company, defendant in error. Citation. Service

of the within citation is hereby acknowledged on this 22nd day of July, A. D. 1914. Collins & Corbin, George S. Hobart, counsel for defendant.

187 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, jr., clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings of this court in the case of United States of America, plaintiff in error, vs. Erie Railroad Company, defendant in error, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this thirteenth day of July, in the year of our Lord one thousand nine hundred and fourteen, and of the independence of the United States the one hundred and thirty-ninth.

[SEAL.] SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Indorsement on cover:) File No. 24324. U. S. Circuit Court Appeals, 3d Circuit. Term No. 580. The United States, plaintiff in error, vs. The Erie Railroad Company. Filed July 27, 1914. File No. 24324.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
ERIE RAILROAD COMPANY.
No. 580.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cause for argument.

This action was brought by the United States in the District Court of the United States for the District of New Jersey to recover penalties for 26 violations of the Safety Appliance Act, 27 Stat. 531, providing that a certain percentage of cars in a train shall be equipped with power brakes. The case has been twice tried in the District Court and twice carried to the Circuit Court of Appeals for the Third Circuit for review. It involves the movement of freight cars in the tidal yard terminal of the Erie Railroad Company contiguous to New

York Harbor, which is comprised of yards situate at Weehawken, Jersey City, and Bergen.

The question is whether the power-brake provisions of the Safety Appliance Act are applicable to transfer trains moving between Weehawken, Jersey City, and Bergen.

The decision of this court is not only of importance to the employees of the railroads and the traveling public, but there is a conflict in the decisions of those Circuit Courts of Appeals which have considered the question with reference to substantially the same conditions as obtain in this case. The Circuit Court of Appeals for the Seventh Circuit has held that the act is applicable in transfer movements of this character (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 198 Fed. 637), while that of the Eighth Circuit has held that the statute is not applicable in such cases (*Chicago, Burlington & Quincy Railroad* v. *United States,* 211 Fed. 12), as also has the Circuit Court of Appeals for the Third Circuit in the present case (212 Fed. 853).

Notice of this motion has been given opposing counsel.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1914.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE ERIE RAILROAD COMPANY. } No. 580.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a civil proceeding by the United States against the Erie Railroad Co. to recover $2,600 as penalties for 26 alleged violations of the safety-appliance act, approved March 2, 1893 (c. 196, 27 Stat. 531), as amended April 1, 1896 (c. 87, 29 Stat. 85), and March 2, 1903 (c. 976, 32 Stat. 943).

The violations alleged in counts one to eight, inclusive, are the use of eight cars equipped with defective appliances, and, in counts 9 to 26, the operation of 18 transfer trains, hereinafter described, without having the requisite number of power brakes in use. Defendant pleaded the general issue.

The case has been tried twice in the District Court for the District of New Jersey and twice in the Circuit Court of Appeals for the Third Circuit.

In the first trial the District Court directed a verdict for the Government. The Circuit Court of Appeals remanded the case for a new trial. (197 Fed. 287, 292.) The District Court in the second trial directed a verdict for the defendant and the judgment thereon was affirmed by the Circuit Court of Appeals. (212 Fed. 853.) The latter judgment is here on writ of error for review by this court.

QUESTION PRESENTED.

The question involved is, whether the provisions of the safety-appliance acts making it unlawful for an interstate carrier to "run any train" or to "use any car," not equipped as required by the acts, "on any railroad engaged in interstate commerce," are applicable to transfer trains of 25 or 30 cars, moving on the main-line freight tracks of such carrier between switching yards several miles apart and located at different freight stations.

STATEMENT OF FACTS.

Defendant is and was a railroad company engaged in interstate commerce. Near the Hudson River in New Jersey it had three switching yards, one at Jersey City, another at Weehawken, and a third at Bergen. Each of these three places was a freight station, having its own published rate,

where freight was received and from which it was dispatched. (R. pp. 40, 55.) Geographically these stations are so located that lines connecting them would describe a triangle, but their railroad connections roughly form the letter " T." (See map, Appendix A.)

These connections constitute the regular main-line freight tracks of defendant between these points. Fifteen important through and local freight trains in each direction, entering and leaving Jersey City, passed over a part of these tracks every 24 hours. (R. p. 38.) Freight carried by defendant, in other than through trains, from New York and eastern points was brought by ferry over to Jersey City or Weehawken, where transfer trains were made up in the switching yards, and thereafter, without further switching or stops, hauled to Bergen over the main-line tracks. These tracks crossed switching tracks, passed through a tunnel under the Palisades seven-eighths of a mile in length, over street crossings at grade and across double main-line tracks, over which 35 passenger trains passed each day. (R. p. 76.)

From a point east of the tunnel, where the Weehawken and Jersey City tracks unite, trains from both places used the same tracks as far as Bergen. Upon arriving at Bergen the transfer trains were broken up, the cars reclassified, local deliveries made, and the rest of the cars forwarded to destination in new trains. In the reverse direction, trans-

fer trains were made up at Bergen for either Jersey City or Weehawken and moved over the same tracks, likewise without further switching or stops, to one of these termini, where freight was either delivered locally or ferried over the Hudson River. About 90 per cent of the freight hauled by these trains was through freight, and about 10 per cent was for local delivery at the three stations. (R. p. 56.) The distances by rail from Jersey City and Weehawken to Bergen are 2 and 3½ miles, respectively, and from Jersey City to Weehawken about 4 miles. (R. p. 37.)

The cars described in counts 4 and 5 moved from Weehawken to Bergen; those mentioned in the other of the first eight counts from Jersey City to Bergen. The defects complained of in the first seven counts consisted of defective couplers, while the absence of a grab iron was alleged in the eighth count. The evidence does not show at what point such appliances became defective, but in each instance the defective car moved from a yard, where the defect was discovered and could have been repaired, to another yard, in a movement not shown to be for repairs, but in a regular transfer movement in association with other cars commercially used.

The trains mentioned in counts 9 to 26, inclusive, were ordinary transfer trains operating from Jersey City or Weehawken to Bergen, or, in the reverse direction, from Bergen to either Jersey City or

Weehawken. They consisted of from 17 to 33 cars, were drawn by switch engines operated by a crew used specially for such movements, carried no caboose, and had no regular schedule, but moved under orders of the yardmasters, as did all other trains using these tracks. (R. pp. 37, 38.) They carried on the rear of the last car a green flag to mark the end of the train, and also a red lantern for use in emergencies. (R. p. 38.) Only 4 of the 18 trains had any power brakes in operation, and they had less than the requisite number in use. (R. p. 37.) During the pendency of this case it has been the general practice of defendant to operate power brakes on such transfer trains. (R. p. 73.)

SPECIFICATIONS OF ERROR.

The assignments of error appear on pages 105 and 106 of the record.

The first alleges that the court erred in upholding the action of the trial court in directing a verdict in favor of the defendant.

In the remaining assignments of error, two to thirteen inclusive, it is averred that the court erred in upholding the action of the trial court in its refusal to instruct the jury, as specifically and in various forms requested, in substance as follows: That, under the facts as shown, they should find for the plaintiff; that the safety-appliance acts were, under the evidence, applicable to the cars and trains in question and movements thereof were in violation

of said acts; that the air-brake provision was for the protection of all employees; that no exception in the act relieved defendant of the obligation to operate air brakes on any train hauled on its main line; and that an absolute duty rested upon defendant to use air brakes on any train hauled over the main line of an interstate railroad.

ARGUMENT.

The case presents two phases, relating to defective appliances and inoperative power brakes, respectively, which will be separately considered.

I.

DEFECTIVE APPLIANCES.

The petition alleges, in counts 1 to 7, inclusive, the unlawful use of cars equipped with defective couplers, and, in the eighth count, the absence of a grab iron. It is admitted that all of said cars moved and were defective in the manner alleged (R. p. 36); that the repairs necessary to recondition them, except perhaps those mentioned in counts 5 and 7, were light repairs; and that all repairs could have been, but were not, made where the defects were first discovered, defendant having facilities therefor at all three yards. (R. pp. 36, 37.) It would, however, have taken two or more hours to repair the cars mentioned in the fifth and seventh counts.

Under the admitted facts, therefore, the only question presented in this connection is, whether the hauling of these cars, in association with other cars commercially used, from one switching yard where the repairs could have been made, over defendant's main line in transfer trains of the character described, to another switching yard where the repairs might also have been made, was a violation of the safety-appliance acts. These acts provide:

> * * * it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. (Sec. 2, act of Mar. 2, 1893, c. 196, 27 Stat. 531.)
>
> * * * it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. (Sec. 4, ibid.)

The Court of Appeals held that the movements of the transfer trains in question were switching operations and that the acts do not apply to switching. The Government maintains that they were not switching but transfer movements, similar to regular main-line operations, and that, even if they did

constitute switching movements, the acts would be equally applicable.

> The coupling and uncoupling of cars, however, is confined almost wholly to such operations, and to hold that it is not a violation of the law to have the coupling and uncoupling apparatus in a defective condition at such times would be a clear nullification, not only of the language of the statute, but of its manifest purpose. (*Chicago, B. & Q. R. Co.* v. *United States*, 211 Fed. 12, 14; *United States* v. *Chesapeake & Ohio Ry. Co.*, 213 Fed. 748, 751; *United States* v. *Pere Marquette R. R. Co.*, 211 Fed. 220, 222.)

This court, making no distinction between main-line and switching operations, has held in *Delk* v. *St. Louis & San Francisco R. R. Co.* (220 U. S. 580, 589), and *Chicago, Burlington & Quincy Ry. Co.* v. *United States* (220 U. S. 559), both cases involving the hauling of defective cars on side or switch tracts, that the acts—

> imposed on the carrier an absolute duty to provide its cars, when moving in interstate traffic, with the required couplers, and keep them in proper condition, and that, too, without any reference to the care or diligence which might have been exercised in performing its statutory duty. (*Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580, 589.)

Prior to the amendment of 1910, the safety-appliance acts contained no express language exempting any kind of movement.

> Any movement of a defective car was held to be a violation of the act as originally passed. It was undoubtedly the purpose of Congress in adopting the amendment of 1910 to somewhat relax the rigid rule which had theretofore been announced as to the time within which repairs of defective cars should be made. (*United States* v. *Chesapeake & Ohio Ry. Co.*, 213 Fed. 748, 750.)

Therefore, any movement of a defective car must be justified under the amendment, whether it be considered an added limitation or merely as a legislative interpretation of the acts, as contended by defendant. In either event, the exceptions can not by construction be extended beyond the language of the amendment.

The amendment provides:

> SEC. 4. That any common carrier subject to this act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this act not equipped as provided in this act, shall be liable to a penalty of one hundred dollars for each and every such violation. * * * *Provided*, That where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective

> or insecure to the *nearest available point* where such car can be repaired, without liability for the penalties imposed, * * * *if such movement is necessary* to make such repairs and such repairs *can not be made except at such repair point;* * * * and nothing in this proviso shall be construed to permit *the hauling of defective cars by means of chains instead of drawbars,* in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight. (Act of Apr. 14, 1910, c. 160, 36 stat. 298.) [Italic ours.]

Where advantage is to be taken, however, of the exceptions provided, it must be by special plea and the burden of proof rests upon the defendant. (*Schlemmer* v. *Buffalo, Rochester, etc., Ry. Co.,* 205 U. S. 1, 10.)

In the case at bar defendant pleaded only the general issue and no evidence was adduced to show that the cars in question fell within the proviso.

There was no attempt to show that the cars had been "properly equipped," or that they became defective while they were "being used by such carrier upon its line of railroad," or were being "hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point" where they could be repaired, or that such movement was "necessary to make such repairs and such repairs" could not be made except

at such repair point. On the other hand, the contrary affirmatively appears.

Furthermore, the evidence discloses that four of the eight cars not shown to contain live stock or perishable freight were chained together and hauled " in association with other cars " commermercially used.

Counsel for defendant in their brief (p. 36) in the Circuit Court of Appeals say:

> We quite agree that the movement of defective cars (whether such defect be in the coupler or in the handhold or some other of the safety appliances) is quite as culpable when made in a terminal yard as when made on a main line, provided such movements are not made for the purpose of repairs.

This admission of counsel, in harmony with the cases cited, and the absence of proof that these cars moved for the purpose of being repaired, establish, it is submitted, a violation of the act.

Furthermore, even if defendant had shown that the defective cars were moved for the purpose of being repaired, still the law would have been violated, since they were hauled in association with other cars commercially used, not to the " nearest available point where " the repairs could be made, but away from such point to another station reached by transit over defendant's main line.

With respect to the violations alleged in the first eight counts, therefore, it is submitted that the

Court of Appeals erred in upholding the action of the trial court in directing a verdict in favor of defendant.

II.

INOPERATIVE POWER BRAKES.

The safety-appliance acts provide that it shall be unlawful for any common carrier engaged in interstate commerce—

> * * * to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. (Sec. 1; act of Mar. 2, 1893, c. 196, 27 Stat. 531.)
>
> * * * the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, etc. (Sec. 1; amendment of Mar. 2, 1903, c. 976, 32 Stat. 943.)

The Interstate Commerce Commission, pursuant to section 2 of the amendment of 1903 providing that not less than 50 per cent of the cars in any train shall have their power brakes in operation

and authorizing the commission to increase the minimum percentage, promulgated an order increasing same to 85 per cent of the cars in such train. It is admitted, however, that none of the transfer trains in question had even 50 per cent of the power brakes in use. (R. pp. 37, 52.)

The character and movements of the transfer trains under consideration have been described. Whether the acts are applicable to such trains is the question here presented.

Defendant contends that the words "any train" used in the act do not include transfer trains, but are limited to road trains.

There are no words in the statute limiting its application to road trains only, and the courts have refused to give the act a narrow meaning.

> Statutes in derogation of the common law and penal statutes are not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning. (Syllabus; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Southern Ry. Co.* v. *United States*, 222 U. S. 20.)

The court, in the *Johnson* case (p. 18), quote with approval the following from the opinion of Mr. Justice Story in the case of *United States* v. *Winn* (3 Sumn. 209, 211):

> But where the words are general, and include various classes of persons, I know of no authority, which would justify the court in

> restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them.

These transfer trains certainly fall within the meaning of the word "train" as commonly understood and as defined by the courts. (*Railway Company* v. *Hackett*, 228 U. S. 559; *Dacey* v. *Old Colony Ry. Co.*, 153 Mass. 112.)

In the case at bar the Court of Appeals say:

> Of course, 35 cars coupled together and drawn by a locomotive make a train, for such connected cars are drawn and follow in the engine's train. (197 Fed. 287, 291.)

Defendant claims, however, that Congress used the word "train" in its technical sense, as understood by railroad men, and that the transfer trains in question do not come within the technical definition of the word.

A "train" is defined in the Standard Code of the American Railway Association and also in the rules promulgated by defendant, as follows:

> An engine, or more than one engine, coupled with or without cars, displaying markers. (R. p. 51.)

Markers are defined both by defendant's rules and the Code of the American Railway Association, as follows:

> The following signals will be displayed: One on each side of the rear of every train,

> as markers, to indicate the rear of the train; by day, a green flag; by night, a green light. * * * (R. pp. 51, 52.)

These transfer trains, which consisted of an engine and from 17 to 33 cars, were hauled over defendant's main line between stations several miles apart. They carried a green flag on the rear car "to indicate to the towerman that the end of the train had passed intact through the tunnel." (R. p. 38.) Such flag was undoubtedly a marker.

It is mere quibbling to say that such combination of engine and cars was not a train, because it carried one green flag instead of two on the rear car, to indicate the end of the train.

The letter of the statute, therefore, undoubtedly includes transfer trains of the character described. It is submitted that such trains also fall within the spirit of the act.

The primary object of the safety-appliance act is to promote the public welfare by securing the safety of employees and travelers. (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1.) It is just as necessary to the accomplishment of this purpose that transfer trains, moving over the main freight line of the carrier and across passenger line tracks, should be equipped with and have in operation a sufficient number of power brakes, as that road trains using the same track should be so equipped.

Under modern railroad conditions, transfer trains are constantly moved between switching

yards over considerable stretches of main line track, passing over bridges and grades, through tunnels, under overhead obstructions, and over switches and railroad crossings. If it should be held that such movements are not within the contemplation of the act, a great number of employees operating such transfer trains will be unfairly exposed to dangers, against which like employees on road trains are protected.

It is submitted that the act does not contemplate any such distinction between employees engaged in the same kind of work. There are no words therein which would justify such construction. On the contrary, the language of the act is very broad, and, as amended in 1903, provides that it—

> shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce. (C. 976, 32 Stat. 943.)

This court has held, whether the car be on the main line or switch track, that the statute imposes a positive and absolute duty upon the carrier to maintain in good condition at all times the safety appliances required by the act. (*Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U. S. 580; *Chicago, Burlington & Quincy Ry. v. United States*, 220 U. S. 559; *St.Louis, I. M. & S. Ry.* v. *Taylor*, 210 U. S. 281.)

This court has also held, in the language used by Mr. Justice Van Devanter in the case of the *United States* v. *A. T. & S. F. Ry. Co.* (163 Fed. 517), that:

> Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category. (*Chicago, Burlington & Quincy Ry. Co.* v. *United States,* 220 U. S. 559, 577.)

Appropriately, therefore, the argument may proceed in the following words of Judge Sessions:

> Should the statutory requirement concerning the use, connection, and operation of train brakes be given a different construction or interpretation from that which has been applied by the courts to the provisions relating to car coupling apparatus? Clearly not. The two sections of the statute are identical in the form of language employed, in legislative intent, in remedial purpose, and in the mandatory obedience thereto which is required; the only difference being that in the one the unit is a train or combinations of cars, and in the other a single car. (*United States* v. *Pere Marquette R. Co.,* 211 Fed. 220, 223.)

The Circuit Court of Appeals for the Seventh Circuit has held, in a case very similar to the one at bar (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 198 Fed. 637) that the power-brake provisions of the statute are applicable to transfer trains.

The Court of Appeals for the Third Circuit, in the first decision rendered by them in the instant case, thus declare the purpose of the statute:

> It is to lessen the danger incident to such service, to averting collisions, to control train movements on grades, to obviate as far as possible the danger to men of working hand brakes on icy footings, and other dangers incident to road conditions, that this statute was meant to cover. (*Erie R. Co.* v. *United States,* 197 Fed. 287, 290.)

All of the dangers referred to were present in the movements of the transfer trains in question.

The purpose of the act being to guard against the dangers described, it would appear that, in pursuance of the obvious intention of Congress, transfer movements to which such dangers are incident should not be excluded from the protection of the acts except by express language demanding such construction. As we have seen, none such exists.

The Court of Appeals first read into the act an exception excluding bona fide switching movements from its operation. They then hold that the three distinct yards, located several miles apart at different freight stations, constitute a "switching unity" and that any interyard movement, regardless of its nature, within such "switching unity" is a bona fide switching movement. From these premises they deduce the conclusion that, since the transfer

trains in question moved within this "switching unity," their interyard movements were bona fide switching operations and not within the statute, although there was "no switching or change of make-up of these drags of cars during the transit alleged in plaintiff's declaration." (R. p. 37.)

In this connection, Judge Hook, in a dissenting opinion rendered in a similar case, says:

> * * * it is another thing to declare generally that switching operations are without the statute, and then to attribute to that phrase such a broad meaning as to impair the very intent of Congress. The test of the application of the statute is in the essential nature of the conditions presented, not in the words by which they may be conveniently described. * * * It is noteworthy that the phrase "switching operations" does not appear in the statute, though that would have been the easy, obvious way had Congress broadly intended to exempt them. * * * In the passage of the trains all the dangers were present as patently as if they had been solid through trains from distant cities, as to which no one would doubt the applicability of the statute. (*Chicago, B. & Q. R. Co.* v. *United States,* 211 Fed. 12, 20, 21.)

The court complain that "This case was tried mainly by the dictionary," because the Government claimed that transfer trains of the character de-

scribed, came within the expression "all trains * * * used on any railroad engaged in interstate commerce," yet the court build up their whole argument upon mere definitions, given by them to the words "switching operations" and "switching yards," which nowhere appear in the act.

The Government agrees that "it is not a wrangle over mere names" and maintains that the question whether or not a bona fide switching movement falls within the act is not present in this case, but that the question presented is—do the movements, by whatever name described, of said transfer trains, expose their trainmen, the public, and interstate commerce, to the dangers from which Congress sought and intended to exclude them.

The court also laid great stress upon the supposed hardship entailed by construing the statute to include transfer trains.

> To this we reply that, if it be the true construction, its harshness is no concern of the courts. (*St. Louis, I. M. & S. Ry. Co.* v. *Taylor,* 210 U. S. 281, 295.)

However, the hardship is more apparent than real. The coupling of air brakes on transfer trains would require little time, especially if done by additional yardmen reserved for the purpose and if no tests were made. Testing of brakes would not be necessary if the railroad had theretofore performed its duty, since 90 per cent of the cars constituting these transfer trains were moving in through

traffic and supposedly had been previously inspected. The court, in stressing this phase of the case, seemed to have overlooked the fact that 7 of the 18 trains moved from Bergen, where no congestion was claimed. Certainly, therefore, the crowded condition of the freight yard can not be offered as an excuse for not coupling up the air on these trains. Furthermore, the record shows that defendant operated some of the power brakes in four of the trains in question (R. p. 37), and during the pendency of this case has "been coupling up the air excepting on very few occasions." (R. p. 73.)

CONCLUSION.

It is respectfully submitted that the Court of Appeals erred in sustaining the action of the trial court in directing a verdict in favor of the defendant and in not directing a verdict in favor of the Government, or, at least, in not submitting the case to the jury with the instructions requested by the Government.

E. MARVIN UNDERWOOD,
Assistant Attorney General.

NOVEMBER, 1914.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 580.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,
vs.
ERIE RAILROAD COMPANY,
Defendant-in-Error.

BRIEF IN BEHALF OF ERIE RAILROAD COMPANY, DEFENDANT-IN-ERROR.

Statement of the Case.

This case comes before the court on a writ of error to review a judgment in the United States Circuit Court of Appeals for the Third Circuit affirming a judgment entered in favor of the defendant-in-error on a directed verdict in the United States District Court for the District of New Jersey. The action was brought by the United States against the company to recover for twenty-six alleged violations of certain sections of the safety appliance statutes. The case has been tried twice. At the first trial a verdict was directed in favor of the United States; the judgment entered thereon was reversed and a new trial ordered by the Circuit Court of Appeals for the Third Circuit. See 197 Fed., 287. At the second trial a verdict was directed for the company and

the judgment entered thereon was affirmed by the Circuit Court of Appeals. See 212 Fed., 853.

There are twenty-six counts in the declaration. Numbers one to eight inclusive allege the use of eight cars equipped with defective appliances; numbers nine to twenty-six allege violation of the statute by the movement of "transfer trains," so-called, with less than eighty-five per cent. of the cars with air brakes connected so they could be used and operated by the engineer. All of the alleged violations were at the Jersey City Terminal of the company on certain dates from January 17th to February 1st, 1911.

The plea was the general issue. There was no demand for a specification of the defenses intended to be made under such plea.

For convenience of reference, we append the following table of the dates, car numbers, etc., as alleged in the declaration:

COUNTS FOR DEFECTIVE APPLIANCES.

Count	Date Jan.	Defective Car	Interstate Car	Origin and Destination
1	17	1442	73105	Harlem, N. Y.—Ramapo, N. Y. (via J. C.)
2	19	03831	38125	28th St., N. Y.—Weehawken, N. J.
3	19	106812	38125	28th St., N. Y.—Weehawken, N. J.
4	24	69602	74549	Weehawken, N. J.—Meadville, Pa.
5	24	29478	74549	Weehawken, N. J.—Meadville, Pa.
6	27	66749	39947	28th St., N. Y.—Bloomfield, N. J.
7	27	101062	39947	28th St., N. Y.—Bloomfield, N. J.
8	21	11049	100345	Duane St., N. Y.—Whippany, N. J.

AIR BRAKE VIOLATIONS.

Count	Date	Interstate Car	Origin and Destination	Movement
9	Jan. 17	73105	Harlem, N. Y.—Ramapo, N. Y.	J. C. west to Bergen
10	" 19	38125	28th St., N. Y.—Weehawken, N. J.	J. C. west to Bergen
11	" 20	104122	Brooklyn, N. Y.—Whippany, N. J.	J. C. west to Bergen
12	" 21	100345	N. Y. City—Whippany, N. J.	J. C. west to Bergen
13	" 23	16262	Brooklyn, N. Y.—Edgewater, N. J.	J. C. west to Bergen
14	" 24	74549	Weehawken, N. J.—Meadville, Pa.	Weehawken west to Bergen
15	" 24	42092	Scranton, Pa.—Weehawken, N. J.	Bergen east to Weehawken
16	" 25	(Note)	Weehawken, N. J.—Buffalo, N. Y.	Weehawken west to Bergen
17	" 26	41521	Chicago, Ill.—Jersey City, N. J.	Bergen east to J. C.
18	" 26	71113	Rochester, N. Y.—Long Dock, N. J.	Bergen east to Weehawken
19	" 27	80606	Rochester, N. Y.—Long Dock, N. J.	Bergen east to Weehawken
20	" 27	39947	28th St., N. Y.—Bloomfield N. J.	J. C. west to Bergen
21	" 28	102152	Long Dock, N. J.—Chester, Pa.	J. C. west to Bergen
22	" 28	44490	Dumont, Pa.—Weehawken, N. J.	Bergen east to Weehawken
23	" 30	103059	Brooklyn, N. Y.—Edgewater, N. J.	J. C. west to Bergen
24	" 30	8079	Milwaukee, Wis.—Jersey City.	Bergen east to Weehawken
25	Feb. 1	27807	Columbus, O.—Jersey City, N. J.	Bergen east to Weehawken
26	" 1	61471	J. C., N. J.—Lima, N. Y.	J. C. west to Bergen

(Note. Count 16, number of cars not given in declaration.)

Statement of Questions Involved.

We do not agree with the statement of the "question presented" as it appears in the government brief and instead thereof we submit the following:

1. Under the Safety Appliance Statute when cars are found to be defective while they are at a terminal yard (there being no evidence as to where they became defective, or for how long a time they had been defective), has a carrier the right to move such cars through said terminal yard for a distance of two or three miles to a repair shop located in another part of said terminal yard, for the purpose of conveniently and promptly repairing the defects, notwithstanding the fact that it is possible (though causing much inconvenience, and congestion of movements of other cars and trains in the terminal,) to make the repairs while said defective cars are on the track where the defects are first discovered and without moving them therefrom?

2. In the case supposed in Paragraph 1, must the carrier, if it moves such defective cars at all, move them only so far as the nearest repair *track* (said track being located in the same part of the general terminal where the defects were discovered), or may the carrier move the cars to the repair shop located in another part of said general terminal, it appearing that the repair track has a very limited capacity and is used only for making light repairs in emergencies, whereas the repair shop is fully equipped with material and mechanics for both light and heavy repairs?

3. What is meant by the word "train" in the Safety Appliance Act of 1893, and the amendment thereof of 1903, and the supplement thereto of 1910?

4. Does the word "train" as used in said Act, with reference to air brake equipment, apply to the movement of a drag or transfer of freight cars from one part of a railroad terminal or yard to another part of the same terminal or yard, the cars in question not having been made up into regular road trains to go out on the main line of the railroad?

5. Do the air-brake provisions of said Act apply to movements for a distance of two or three miles of "transfer trains" or "drags" of freight cars from one yard, forming part of a terminal, to another yard of the same terminal, it appearing that the management of the entire terminal is under the direction of the same superintendent, the same yard master and the same freight agent; it further appearing that said transfer trains have no caboose, are not equipped with markers similar to those used on "road" trains; and do not come within the technical railroad definition of the word "train"; that they are not run according to schedule; that they are not under the direction of the train dispatcher, but are moved as fast as cars are assembled, under orders of the yard master; that they do not go out on the main line as regular trains, but are broken up at the yard to which they are moved, and there classified and made up into road trains; that they are handled exclusively by switch or yard engines, and by switching crews whose rate of pay is the same

as for ordinary switching service; that the rate of speed is limited by order to fifteen miles per hour, and that the average speed is seven or eight miles per hour?

ARGUMENT.

There are two classes of cases involved, one relating to defective safety appliances, the other relating to air brakes. In this brief we shall discuss the cases in the same order in which they were considered by the Circuit Court of Appeals and shall take up first the question of whether the action of the trial court was correct in directing a verdict in favor of the defendant as to the air brake counts—numbers nine to twenty-six.

POINTS.

I.

The action of the Trial Court was correct in directing the jury to return a verdict in favor of the defendant as to counts numbers nine to twenty-six.

Summary of Statute.

These counts involve what for convenience may be termed the "air-brake violations." The question of the propriety of the action of the trial court in directing a verdict in favor of the defendant as to these counts requires a construction of Section 1 of the original Safety Appliance Act of 1893 (U. S. Comp. Stat., 1901, p. 3174) and Sections 1 and 2 of the Amendment of 1903 to the Safety Appliance Act (U. S. Comp. Stat.

Supp., 1907, p. 885), and of the order alleged to have been made pursuant thereto by the Interstate Commerce Commission.

The Act of 1893 provides (italics ours) that after January 1, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the *train* brake system, or to run any *train* in such traffic after said date, that has not a sufficient number of cars in it so equipped with power or *train* brakes that the engineer on the locomotive drawing such *train* can control its speed, without requiring brakemen to use the common hand brake for that purpose.

Section 1 of the Amendment of 1903 provides that the statute shall be held to apply to common-carriers by railroads in the Territories and the District of Columbia, and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type, "and the provisions and requirements hereof and of said Acts relating to *train* brakes, automatic couplers, grab irons, and the height of draw bars, shall be held to apply to all *trains,* locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce in the Territories and the District of Columbia, and to all other locomotives, cars, tenders and similar vehicles used in connection therewith," excepting those *trains,* cars, and locomotives exempted by the provisions of Section 6 of the Act of 1893 as amended by the Act of 1896.

Section 2 of the amendment of 1903 provides

that, whenever, as provided in said Act, any *train* is operated with power or *train*-brakes, not less than fifty percentum of the cars in such *train* shall have their brakes used and operated by the engineer of the locomotive drawing such *train;* and all power-braked cars in such *train* which are associated together with said 50 percentum shall have their brakes so used and operated. To more fully carry into effect the objects of the Act, the Interstate Commerce Commission was given authority, after hearing, to increase the minimum percentage of cars in any *train* required to be operated with power or train brakes.

The Government alleged that pursuant to this statute the Commission made an order directing that after September 1, 1910, whenever any train is operated with power or train brakes, not less than 85 per cent. of cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, etc.

This order of the Commission reads as follows (italics ours):

> "It is ordered, that on and after September 1, 1910, on all railroads used in interstate commerce, whenever as required by the safety appliance act as amended March 2, 1903, any *train* is operated with power or train brakes, not less than 85 per cent. of the cars of such *train* shall have their brakes used and operated by the engineer of the *locomotive drawing such train,* and all power-braked cars in every such *train* which are associated together with the 85 per cent. shall have their brakes so used and operated." (Page 12 of Rec.)

It will be observed that these provisions of the statute and of the order of the Commission relate

to *trains* and not to *cars*. There is a clear distinction made between the requirements relating to the use and operation of air brakes on *trains* and the equipment of *cars* with certain appliances. The statute makes the train the unit in requiring the use and operation of power brakes and makes the car the unit in requiring certain appliances to be provided.

The stipulation in this case shows that in none of the "transfer trains" involved in these movements was this order complied with (p. 37).

Description of Defendant's Terminal.

The liability of the defendant under this statute to pay the penalties demanded in these counts depends upon whether or not the word "train" as used in the statute and in the order made pursuant thereto, applies to a transfer movement of cars from one part of a general terminal to another part of the same terminal, when the cars have not been made up into regular trains to go out on the main line. All the alleged violations took place at the easterly terminal of the railroad company. This terminal for convenience of operating purposes is divided into three divisions or "yards" known as "Jersey City," "Bergen" and "Weehawken." The relation between these three points can be best understood by reference to the map that was offered in evidence and blue print copies of which have been furnished for the use of the court. These three yards together constitute the easterly terminal of a railroad system extending between New York and Jersey City at one end and Buffalo and Chicago at the other, comprising in all about 2200 miles of railroad. The terminal is located on and near

the west bank of the Hudson River. That part of the terminal which is called Jersey City is located on the easterly side of the Palisades; the part known as Bergen is within the city limits of the City of Jersey City but borders the west side of the Palisades. Bergen and Jersey City are connected by six tracks, two of which pass through a tunnel under the Palisades and four of which are located in an open cut constructed through the Palisades. The third part of the terminal is located in the Township of Weehawken, a municipality separate from Jersey City, located about a mile to the north thereof, between the Hudson River on the east and the Palisades on the west. Weehawken is connected both with Jersey City and Bergen by several tracks which run north and south at the foot of the Palisades and on the easterly side thereof.

Description of train movements and of method of operation.

Of the several alleged "trains" described in these counts, some moved from Jersey City or Weehawken in a westerly direction to Bergen, where they stopped, and the cars were then classified, made up into road trains for a further movement west, and turned over to the "road crews"; some of the "trains" moved from Bergen east to Jersey City or to Weehawken. These transfers were made up of cars that had come to Bergen in trains from the West which on arrival at Bergen were broken up and the cars separated and sent forward to their final destination in these "transfers." Such movement was under the direction of the yard crews, the road crews having surrendered the trains at Bergen. There is no dispute in the testimony either as to the move-

ments of the various transfers or as to the system of operation at the Jersey City Terminal. This was described in detail by Mr. Mantell, the terminal train master of the defendant. At the "Jersey City Terminal" (which includes the yards known as Jersey City, Bergen and Weehawken) there was a terminal superintendent who had charge of the freight operations therein, as well as of the docks on both sides of the Hudson River and certain docks in Brooklyn. There was a general yard master who had charge of the three "yards" known as Jersey City, Weehawken and Bergen, with twenty-two assistant yard masters. The three yards were themselves subdivided into various tracks, and were in charge of individual yard masters under the general direction of the general yard master. The assistants report to the general yard master as well as to the yard master in charge of each particular yard. In January, 1911, some thirty-five or thirty-six switch engines were engaged in those yards. The operating force was from two to three hundred men (pp. 60, 61.)

There were no yard limits for any of the three yards as such nor between any of them. The rule of the defendant company, as well as of the American Railway Association, defines a yard as follows:

> "A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time table or by train order may be made, subject to prescribed signals and regulations" (p. 61).

The movements of the cars in question were not made according to schedule; the cars were

started out as fast as enough had been assembled. There was no particular time of the day fixed for such movements. The cars were assembled under the direction of the individual yard master in charge of a particular group of tracks, and were then sent to the large classification yard at Bergen (p. 62). The Jersey City Terminal has no yard limit sign, but extends to the Hackensack River about a mile west of Bergen. The main tracks, over which scheduled trains pass are entirely separate; they do not come through the freight yard, but run around it. None of the passenger trains pass over the tracks over which these "drags" were made. From Jersey City to Bergen there are four passenger tracks and several lines diverge from the main line. Then the main line has two tracks out across the meadows and over the Hackensack River (p. 62).

Mantell describes the tracks in the various yards as follows: Bergen yard consists of eastbound, as a receiving yard, known as Yard E, which has ten tracks, and a classification yard, which is known as Yard F, which has thirty-eight classification tracks. Trains arriving in this yard off the main line and various side lines divisions, were broken up over a hump or a switch.

> "We have provided a plan of switching there into various classifications for New York Harbor delivery as well as for our own dock delivery in Jersey City and Weehawken; classified freight as a commodity handled on individual dock as well as classifying it for various connections. Westbound yard, known as Yard D, consists of ten tracks, where these drags of cars as well as trains from off the side line divisions are taken

care of and are shunted over what is known as a hump into a classification yard which has twenty tracks. There are about thirty to thirty-five classifications made of westbound. In that yard trains are assembled and made up for their proper destinations; in other words, trains are prepared to go out on the road" (p. 63).

He further said:

"In the Bergen yard we maintain a crippled yard shop, consisting of about eight tracks and a shop at that point, and all cars that are crippled and not assembled, other than some light repairs that might be made at water-front yards, or at Jersey City and Bergen, are all sent to this point and placed in the cripple yard, and when repaired are brought out and put in line to go into loaded trains to go to their destinations.

"An eastbound freight train, when it arrives at the Bergen yard, would be pulled into what is known as the receiving yard—that is, Yard E. That train is inspected, the waybills are gone over by yard clerks. Cards are tacked on to the sides of the cars. We have a large engine at that point, known as the hump engine, that pushes these cars on the switch and by gravity they are run down on to the thirty-eight tracks that I have referred to. We make something like forty-five classifications of cars there—that is, eastbound—off of this hump, some of which have to be handled a second time; the train is practically broken up, broken up into forty-five different classifications" (p. 63).

Freight trains that go west come to the Bergen yard from various divisions. Drags of cars also come from Weehawken and Jersey City and are put over the hump, and twenty-five classifications made according to where they are going.

None of these drags pass through the Bergen yard without being broken up and classified. A small proportion of trains that come from the west, known as "manifest" trains, containing high class freight, pass through the Bergen yard easterly without being broken up. None of the trains went through from Bergen to Weehawken (p. 63).

The Jersey City yard is known as a "high-class" yard where perishable freight is held for New York delivery (p. 64).

> "Highly perishable freight is held in this yard, sometimes as high as three to four hundred cars. The Jersey City yard is an advance yard for the Croxton or Bergen yard. We classify the freight at Bergen and we pull it into Jersey City or Weehawken, to keep it close to the water-front, waiting for orders. We try and keep all perishable freight at Jersey City because we have icing facilities at that point, and also keep it there subject to orders, subject to lighterage in the harbor.
>
> "We have a yard known as the North side yard at Jersey City, that being a local name, and in that yard is held highly perishable freight as well as some extra freight, such as automobiles and so on, and we make deliveries to what are known as contract terminals—Bush dock and Jay Street terminals—where we have certain privileges. And in the South side yard we handle grain. At that point we have an elevator with a capacity of a million and a half bushels—as well as local team delivery, as well as milk trains. We handle there about seventy-two cars of milk a day. We endeavor to keep out of Jersey City yard, so far as possible, all freight known as local freight and hold that in Bergen yards subject to orders from our agent at Long Dock.

> "At Jersey City we maintain float barges for the floating cars to our various stations in New York and Brooklyn as well as to contract terminals. We also make up in that yard trains containing high class freight; also some local trains" (pp. 64, 65).

The condition at Jersey City is very congested. Immediately to the south is located the Pennsylvania Railroad, and immediately to the north is the Lackawanna. Beyond the Lackawanna are steamship piers. "There is not a bit of available land there now. We are looking for land there and cannot get any" (p. 65).

He described the condition at Weehawken as follows:

> "At Weehawken we have eight docks, one a coal dock, two docks that are open docks on which we handle structural iron, lumber and different other rough commodities, as freight; and five covered docks on which are handled commodities such as sack and barrel flour materials, tobacco, agricultural implements and so forth. This yard here receives these drags of cars that are switched out in the Bergen yards, and places them on the different docks. Also we have a connection there with the Weehawken Manufacturers' Railroad as well as the West Shore Railroad, and have a town delivery track. We also have a large poultry shed at that point" (p. 65).

In the Bergen yard there are about 115 tracks with a capacity of about 5,000 cars; in Jersey City, about 60 tracks with a capacity of about 1,000 cars; and at Weehawken, about 80 tracks with a capacity of about 1,100 cars—meaning by "capacity," when the yard is entirely blocked. There are about 145 miles of tracks in the three yards. The biggest yard is the one at Bergen,

otherwise known as "Croxton," located on the meadows, which is the only place left for the company to spread (pp. 63, 66).

The movements of the drags of cars in question were made by switch engines (p. 66). These engines are also called "yard" engines. Such engine is one assigned to yard service and working within yard limits (p. 68). The pay of the men who do this work is the same as that for ordinary switching service. For road service, that is for handling trains on the main line, the rates are different (pp. 66, 67).

The regular trains carry markers at the rear end of the rear car. These in the day time consist of two green flags, one on each side of the rear of the rear car; at night, the markers consist of two lanterns, one on each side of the rear of the rear car, each lamp showing red to the rear and green to the front and to each side. These are the same markers as are prescribed by the Standard Code of the American Railway Association (p. 68). The drags of cars in question had on the rear end of the rear cars, a green flag and a red light; if the rear car was a box car, the flag was tied to the rung of the ladder at the left hand side; if a coal car, it was tied to the grab iron; the red lantern was placed, on box cars, on top of the running board at the center of the rear end, and on coal cars at the end sill at the rear end—there being one such lamp in each case. The flags were used to indicate to the towerman at each side of the tunnel, that the end of the drag had passed in tact through the tunnel. The red light was for use in case of emergency (pp. 37, 38; 77, 78).

The usual speed of these drags of cars was about seven to eight miles an hour, and the rules

provided that a drag moving through yard limits must be under full control and prepared to "stop short of obstruction" (p. 68).

The time required to couple up the air for drags containing twenty-five to thirty-five or forty cars, would be from one hour and twenty minutes to one hour and twenty-five minutes. The reason for this was explained by the witness in detail, and is due to the necessity of pumping up the air, testing it, measuring the piston travel, etc. (p. 69).

The difficulty with having any air brake connections with the drags of cars in question is because there is not sufficient room, especially at Jersey City and Weehawken. The cars must be kept moving (pp. 69, 70). An attempt was made on one occasion to couple up the air and the result was that several cars of fruit had to be dumped on the meadows and many claims followed (p. 70). The congestion at Bergen, due to the fact that there is a transfer station, would also interfere with the use of the air brakes, under such circumstances (pp. 70, 71).

Summary of characteristics of transfer trains.

The distinction between *regular* trains and these *transfer* trains or "drags of cars," as shown by this testimony, may be summarized as follows:

(1) A train is defined in the Standard Rules as "an engine, or more than one engine coupled with or without cars, displaying markers." The definition thus given corresponded with the definition given by the Government's own witness Gibbon (p. 51). The definition of markers is given in the Standard Code, Rule 19, as follows: "It is required that the following signals be displayed: one on each side of the rear of every train, as

markers to indicate the rear of the train: by day, a green flag on each side; by night, a green light to the front and side, and a red light to the rear, except when a train is turned out to be passed by another and is clear of the main track, when it is required that a green light be displayed to the side and rear" (pp. 51, 52). The location of these markers is indicated by illustrations on page 63 of the defendant's rules, pages 133, 134 of the standard rules (pp. 67, 68). The transfer trains in question did not have markers of the kind required on regular trains—there being in the rear of such trains a green flag and a red light. (See stipulation, p. 38).

(2) The transfers were not run according to schedule, but were moved as fast as enough cars had been assembled (pp. 45, 61).

(3) The operation of the transfers was not by "train orders" under the direction of the train dispatcher, but under orders of the individual yard master in charge of a particular group of tracks where the transfer was about to leave (p. 62).

(4) The transfers were operated only from one yard to another yard forming part of the same general terminal. When going west, they were classified at Bergen and at that point were made up into regular trains, and when coming east, they were broken up in that yard and there classified for final delivery (pp. 62, 63).

(5) The transfers were handled by switch engines instead of by road engines (pp. 65, 66, 68).

(6) The pay of the men employed in moving these transfers was the same as for ordinary switching service, and the rate of pay is different from the rate for road service (pp. 66, 67).

(7) The rate of speed was limited to fifteen miles per hour, and in most cases the speed was seven to eight miles an hour (p. 68).

(8) None of the crews in charge of the transfers ran further than Bergen, except in the case of a few through trains under special orders. But none of the transfers in question were such kind of trains (p. 65).

(9) The movement of the transfers was for a short distance, being only two miles between Jersey City and Bergen, and three and a half miles between Weehawken and Bergen (p. 37).

(10) None of the transfers had a caboose (p. 38).

As bearing upon the claim of defendant that the movements of these transfers were yard movements as distinguished from road movements, the following additional points should be noted.

(11) The operation of all three yards was under the direction of a terminal superintendent and a general yard master (pp. 59, 60). There was no defined limit for any one of the three particular yards known as Jersey City, Weehawken and Bergen, separating one from the other (p. 61).

(12) But the three yards together come within the definition of "yard" as given in the Rule Book, namely, "a system of tracks within defined limits, provided for the making up of trains, storing cars and other purposes over which movements not authorized by time table or train order may be made subject to prescribed signals and regulations." The Jersey City terminal as such, extends to the Hackensack River, a distance of about one mile west of the Bergen Yard (pp. 61, 62).

(13) The main line tracks over which scheduled trains pass do not go through the freight yard, but are separate, and run around it (p. 62).

(14) No passenger trains use the tracks over which the transfers were moved (p. 62), although the trains of the division called the Northern Railroad Division which is one out of seven at the Jersey City terminal, crossed two of the "running tracks" west of the west end of the tunnel (p. 76) At the point where they crossed there were block signals (p. 80).

(15) The same freight agent is in charge of Bergen, Jersey City and Weehawken (p. 55). Freight consigned to points in New York Harbor is held at any of these three yards (p. 56).

(16) While the filed tariffs show three separate stations at Jersey City, Weehawken and Bergen, they also show charges for *switching* of certain cars between these points. The same *freight* charge is made regardless of whether cars are billed to Jersey City, to Weehawken or to Bergen; they are all billed at the New York rate (pp. 54, 56; 59, 60).

In this connection it should be observed that when it appears that a statute applies to a particular business and directly affects that business, and that the words may have a technical meaning, the statute is then to be so construed as to give those words their technical meaning. It will be presumed that Congress intended words to have the meaning that they are ordinarily given by the business that is directly affected by the statute.

U. S. v. 112 Casks of Sugar, 8 Pet., 277;
Curtis v. Martin, 3 How., 106;
United States v. Breed, 1 Sumn., 159 l. c., 163;

Lewis, Sutherland on Statutory Construction, Vol. 2 (Sec. Ed.), Sec. 395 (254), pp. 753-754.

See also:

U. S. v. Patterson, 150 U. S., 68;
Arthur v. Morrison, 96 U. S., 108;
Lawrence v. Allen, 7 Howard, 765;
U. S. v. Weise, 2 Wall, Jr., (C. C.), 72;
Elliott v. Swartout, 10 Peters, 137;
State v. Murlin, 137 Mo., 306;
State v. Railroad, 219 Mo., 156.

Summary of undisputed facts.

Under these facts, none of which was in dispute, we submit that the three yards known as Jersey City, Weehawken and Bergen must be considered as each forming part of one general terminal. The Circuit Court of Appeals in the instant case said on this subject:

> "In view of the absence of evidence on the part of the Government, and of the undisputed facts proved by the defendant, the question whether these three yards are or are not a switching unity is not debatable. Unquestionably they are. That the cars in question were being subjected to switching classification in successive yards of this system is undeniable. Courts no more than individuals can close their eyes to the fact that they were being moved in switching, not road, service, and that this service was continuously and interruptedly a switching service none the less because barriers of nature—the Hudson River and Palisades at front and rear, and the laws of man in a prior use by common carriers, north and south—necessitated part of such switching being done on one side and part on the other of the tun-

neled Palisades. Of the physical fact that this was a switching operation there can be no doubt. Of the legal results that flow from that physical fact there is, of course, a question but as to the facts themselves, there is no question," 212 Fed., 858. (Record, pp. 99, 100.)

And again, in the same opinion, in distinguishing the decision in *U. S. v. Pere Marquette R. R.*, 211 Fed., 220, the Court said:

> "It is clear that the Wyoming terminal is wholly different from the Erie, because in the Erie we have three switching yards interdependent on each other, each supplementing and each necessary to complete the partial switching done in the other, and all forming a unitary combination system topographically indispensable to the handling of incoming and outgoing trains." 212 Fed., 859. (Record, p. 101.)

Decisions re meaning of "train."

There being then no question as to the facts, the only remaining question to consider is the legal results that flow therefrom. In this connection let us examine the reported cases in which the word "train" has been construed. We will first consider cases in which the meaning of that *word* is discussed; and then, cases in which the *construction* of the word as used in the safety appliance statute is considered and in which the points now under consideration were more or less directly involved.

A case in Illinois is close to the present one. A statute of that state provided as follows:

> "No railroad corporation shall run or permit to be run upon its tracks, any train of cars, for the transportation of merchandise

or other freight, without a good and sufficient brake attached to the rear of hindmost car of the train, and a trusty and skillful brakeman stationed upon said car, unless the brakes are efficiently operated by power applied from the locomotive."

In *Chicago & Eastern Railroad Co. v. Maloney*, 77 Ill. Appeals, 191, it was held that the evident intent of this statute was to apply to trains running from one place or station to another, and not to a switching movement of cars in a freight yard. The appellee's intestate was employed as a laborer in a railroad freight yard in Chicago, and his duty was to clean snow and ice from the switches. While thus engaged, he was struck by the rear end of a train of fourteen cars being pushed by a locomotive. It was the purpose of the crew in charge of these cars to back the train through the switch wherein Maloney was working, to another part of the yard. In holding that there was no liability on the part of the Company, the Court said:

"Under the facts in the case at bar, this statute has no application. This section is not intended to control the making up of trains in the yard of a railroad company.

"The making up of a train by a railroad company in its yard at a terminus is not running 'upon its railroad a train of cars for the transportation of merchandise or other freight.' We cannot concede that because the cars being switched in the appellant company's yard were loaded with coal, they were, therefore, being used for the 'transportation of merchandise' within the meaning of this statute. This section of the statute was evidently intended to apply to trains running from one place or station to another. A few cars being switched about in a freight yard are not a 'train' in the sense that word is there used."

As showing that word "train" is not to be literally construed but depends upon custom, see *Harris v. Rex*, 9 Canadian Exchequer, 206 (1904), where the court was called on to construe the meaning of the phrase "train of cars" as used in the "Railways Act" of Canada, by which it is enacted that whenever any train of cars is moving reversely in any city, etc., the locomotive being in the rear, a person shall be stationed on the last car in the train, who shall warn persons standing on, or crossing, the tracks of such railway of the approach of such train. The Court said:

> "Now, as to this rule and provision the question at once arises as to whether or not an engine and tender constitute a 'train' or 'train of cars.' The contention of the suppliant that they do is supported by the opinion of the court in *Hollings v. Canadian Pacific Railway Co.* (21 Ont. R., 705). * * * But I have not been able to come to the same conclusion. So far as appears from the evidence in this case, and so far as I am aware, an engine and tender is not, in the running of trains, treated as a train or train of cars. An engine and tender without cars attached are, in practice, left to the control and management of the engine-driver, assisted by his fireman" (p. 211).

In *McNealy v. State*, 94 Ga., 592; 21 S. E., 581, held that an indictment which charged the running of a "freight train" on Sunday, could not be sustained when the evidence showed that the train that was run consisted only of a locomotive and a cab.

Counsel for the Government cite the cases of *Chicago, etc., Ry. Co. v. Hackett*, 228 U. S., 559 and *Dacey v. Old Colony Ry. Co.*, 153 Mass., 112, as authority for the proposition that these "trans-

fer trains" fall within the meaning of the word "train" as commonly understood and as defined by the courts. The *Hackett* case has nothing to do with the safety appliance statutes. The court was discussing the question of the constitutionality of a statute of the State of Indiana which provided that railroads should be liable for personal injuries suffered by their employees in certain cases.

The *Dacey* case arose under an employers' liability statute similar to the statute of Indiana referred to in the *Hackett* case. The "train" in that case had been made up for road service and was about to proceed out of the yard. We submit that cases that construe statutes relating to the liability of employers in certain cases when an accident happens by reason of negligence have no bearing on the proper construction of the safety appliance statute in suits to recover penalties thereunder.

Decisions re Air Brake Violations.

In *United States v. Chicago, etc., R. R. Co.*, 162 Fed., 775 (charge of Judge Reed of the District Court for the Northern District of Iowa), suit was brought to recover penalties for the air-brake violations, but the trains in question were regular freight trains running out of the main line, and the application of the statute to a yard movement was not involved.

In *U. S. v. Baltimore & Ohio R. R. Co.*, 176 Fed., 114 (affirmed in 185 Fed., 486), it was held by Judge Orr of the District Court, Western District of Pennsylvania, that the provisions of the Safety Appliance Act requiring trains to have a sufficient number of cars equipped with power

or train brakes so that the engineer could control the speed without requiring brakemen to use the hand brake, could not be construed to prohibit the use of hand brakes. But the question of the construction of the statute so far as relates to the meaning of the word "train" or "trains" was not involved in the case; the alleged violations of the statute did not occur while the cars were being shifted in yards, but while they were out on the main line.

In *Rosney v. Erie R. R. Co.*, 135 Fed., 311, suit was brought by the widow of an employe to recover damages; the decedent was employed as a fireman, his death being due to an accident caused by a collision between the engine on which he was working as a fireman, and another engine. The collision occurred in the company's yard at East Honesdale, Pa. The engine with which the decedent's engine collided was provided with air-brakes, but the air-brakes on the car were not connected. Judgment in favor of the Railroad Company was affirmed by the Circuit Court of Appeals for the Second Circuit. This conclusion was based on the ground that the plaintiff failed to prove any negligence on the part of the defendant, and that the accident happened because of the mistake of one or both of the train crews, who were fellow servants with the decedent. In the course of the opinion, Judge Coxe says:

> "The act of Congress of March 2, 1893; 27 Stat., 531, c. 196 (U. S. Comp. St. 1901, p. 3174), amended March 2, 1903; 32 Stat., 943, c 976 (U. S. Comp. St. Supp. 1903, p. 367), requiring common carriers engaged in interstate commerce to use automatic couplers and air-brakes on engines and cars used in interstate commerce has no bearing upon the present controversy. Assuming that the act

> applies to cars being shunted about in a switching yard where, from the nature of the business it would be impracticable, if not impossible, to connect up the air-brakes, it cannot be invoked in the present instance for the reason that there is no proof that the engine and cars were used in interstate commerce."

While the remarks as to the application of the statute to cars in a yard are dicta, they throw some light on its reasonable construction; it is quite apparent that Judge Coxe thought that it did not apply to the movement of cars in a railroad yard.

In *U. S. v. Boston & Maine R. Co.,* 168 Fed., 148, Dodge, District Judge, in charging the jury said that by "train" he understood one aggregation of cars, drawn by the same engine, and if the engine is changed there was a different train (p. 153). But the occasion for this remark was the claim of the Government that there were two violations of the statute when there was a defect in the car being moved in a certain train, and thereafter the train stopped and waited and then went on again. He charged that in such a case there would not be two violations of the law, but only one, because the car was all the time being moved in the same train, and that it made no difference if it was so moved on two different days. Hence the case is not in point on the question as to whether the word "train" includes a movement of cars in a yard or from one yard to another yard.

In *Belt Ry. Co. of Chicago v. U. S.,* 168 Fed., 542, suit was brought to recover penalty for alleged air-brake violations, but the only point for consideration was whether under the circumstances of the particular case the Railway Company when it made the movement of the cars in

question was engaged in interstate commerce. This movement was from the tracks of one company over the lines of the railroad to the tracks of another company; but the question of the application of the statute to a movement of cars from one part of a railroad yard to another part of the same yard of the same company was not involved nor considered.

In *Galveston &c., R. Co. v. U. S.*, 183 Fed. 579 the Circuit Court of Appeals for the Fifth Circuit affirmed a judgment in favor of the government in a suit based upon an allegation that the company violated the air brake sections. The opinion does not state the facts but an examination of the record of the case shows that the following facts were undisputed:

After leaving the terminal, the air pump on the locomotive broke down, thus rendering the power or air brakes on the cars inoperative; from the point where the air pump broke down the train proceeded to the first siding at Longfellow, where it remained for about two hours, and was then hauled into Sanderson in the same defective condition; there were no repair shops or facilities for making the necessary repairs at Longfellow, but the repairs to the air pump could have been made if men had been sent out from the terminal at Sanderson to do the work; another engine could have been sent out from Sanderson to Longfellow and could have brought the train into Sanderson under air.

The Government contended that under these circumstances the defendant violated the safety appliance law in hauling the crippled train from the siding at Longfellow into Sanderson.

It will be seen that the movement of the cars

in this case was on the main line. The question of movements of *transfer* trains from one part of a terminal to another part of the same terminal was not involved.

In *U. S. v. Atlantic Coast Line R. Co.*, 214 Fed., 498, the District Court for the Southern District of Florida held that the air-brake provisions of the statute applied to cars that were being moved in switching operations. That case, however, was on a demurrer to defendant's pleas and the facts are not very fully stated. The air-brake count sought to hold the company liable "for operating on its line one train of eight of its own cars, when only two cars had their brakes operated by the engineer," etc. The special plea to this count was that the cars "were merely being moved about in switching operation."

Furthermore, we are advised by the attorneys of the railroad company in that case that by stipulation with the Government this count was dismissed and another action brought in which the company set forth the facts more in detail, alleging that the engine and cars were moved wholly within the switching yard and that the movement was a switch movement for the purpose of assembling and distributing the cars into trains preparatory to train movements upon the lines of the company; that the said engine and cars were wholly under the control of the switching crew within the switching yard and were not a train within the meaning of the statute. The Government demurred to this plea and the demurrer was overruled in an opinion filed September 24, 1914—(not yet reported) the court following the decisions of the Circuit Court of Appeals in the instant case.

In *United States v. Chesapeake & Ohio R. Co.*,

213 Fed., 748, the Circuit Court of Appeals for the Fourth Circuit cites the instant case and dissents therefrom. However, that case is of no importance for the present discussion for the reason that the opinion shows that it did not involve the question of the construction of the air brake provision of the statute, but considered only a movement of a car in and around the railroad yard while the coupling apparatus was defective and after the defect had been discovered.

The ruling of the Court of Appeals in the instant case has been followed by the Circuit Court of Appeals for the Eighth Circuit in *Chicago &c., Ry. Co. v. U. S.*, 211 Fed., 12. The facts are very similar, the only difference being that in the one case the railroad had three yards forming parts of one terminal, whereas in the other there were two yards. The opinion of the Court in that case is so apt to the facts and to the law (as we claim it to be) of the instant case that we quote from it at length as follows:

> "It is not controverted by the government that the provisions of the Safety Appliance Act in regard to air brakes have not heretofore been regarded as applicable to switching operations. This has been the interpretation of executive officers charged with the enforcement of the act, and is justified by the language of the statute. The words, 'on its line,' 'in moving interstate traffic,' 'to run any such train in such traffic,' are properly applicable to trains moving from point to point rather than to switching operations. We do not think the act of 1903 was intended to make any change in the original statute in this respect. That statute was passed to correct the decision of this court in the case of *Johnson v. Southern Pacific Railway Co.*, 117 Fed., 462, 54 C. C. A., 508, and was main-

ly declaratory. *Johnson v. Southern Pacific*, 196 U. S., 1, 21, 25 Sup. Ct., 158, 49 L. Ed., 363.

"The controversy here presented has arisen because of a change in the method of doing switching at important terminal points since the passage of the statute. When the act was passed terminal yards consisted of main tracks and a system of sidings upon which cars were moved by the old 'push and pull' system. Even in such yards the main tracks of the road were used to a considerable extent in switching operations. The immense increase in the volume and density of traffic upon American railroads since 1898 has compelled a complete reconstruction of terminals at all important points. These terminals now consist of at least two systems of ladder tracks operated by gravity or by the hump and gravity systems combined. In one of these yards incoming trains are broken up and the cars distribute upon different sidings according to their destination. From these sidings strings of cars are pulled out and moved forward to another system of tracks constructed upon the same plan as the first, and there distributed upon sidings so as to constitute trains to be carried forward by connecting carriers. For trains moving in the opposite direction the process is simply reversed. Another ladder of sidings in the yard in which the cars were assembled into trains becomes a yard for classification, and the classification yard becomes the yard in which cars are assembled into trains to be carried forward in the opposite direction. In this reconstruction of terminals old yards have, as a rule, been used as one end of the system, and carriers have been compelled to go considerable distances to find land that could be acquired at any reasonable price for the other end. While the record is silent on the subject, we have no doubt that this was the reason for the location of the Murray

yard across the river. Standard works such as Droege's Freight Terminals and Trains, published in 1912, give the history of this development and the construction of present-day terminals and the methods of handling cars therein. The double system of yards above described is the simplest form now in use, and in important terminals, instead of there being two yards, the traffic has compelled the construction of several yards. In the publication referred to such yards are described with drawings, which make both their structure and method of operation much more plain than any verbal description. This combination of yards constitutes a single terminal yard, and is just as indispensable in the switching of freight cars at the present time as the old system of sidings was a few years ago.

"This case was tried mainly by the dictionary. We have much reasoning of counsel upon general principles. What we would have preferred would be an accurate description of the development of the terminal yards at Kansas City. The present structure of those yards; the method of handling trains therein; the speed at which transfer trains are moved between the yards; the control over such trains afforded by the coupling up of the air upon a part of the cars only; whether in actual practice, with the air coupled up on six to ten cars, the engineer can control the speed of these transfer trains from the locomotive, 'without requiring brakemen to use the common hand brakes for that purpose'; what, if any accidents have resulted from the failure to couple up 75 per cent. of the air; the time that would be consumed in coupling up 75 per cent. of the air on such trains; the number of trains that are moved in the yard; the effect upon the movement of cars in such terminal yards if 75 per cent. of the air had to be coupled up on all these strings of cars. In other words, the evidence

should do all that could be done to place the court in the same position as an experienced railroad man in judging of these transportation questions. Instead of reasoning from such a disclosure of the actual facts, the attempt is made to deduce the decision of the case from the definition of the word 'train' by a process of abstract reasoning. One fundamental trouble with such reasoning is that it proves too much. The word 'train' of course covers any string of cars hauled by an engine. But if the statute is to be applied to all trains falling within this definition, then it would cover all movements of cars by means of a locomotive in switching operations, and it would make no difference whether that movement was on a main track or a siding. Such a result reduces the reasoning to an absurdity, because its application to railroads would operate as an embargo upon commerce. Because of these results, as well as from the language of the statutes, we are of the opinion that the air-brake sections of the Safety Appliance Act were not intended to apply to switching operations. But if the statute at the time of its enactment was not intended to apply to such operations, may the court, because those operations have been enlarged since the passage of the act, apply the statute to the new conditions? We think not. That is a matter for Congress and not for the courts. If conditions have so changed in our modern terminal yards as to require that strings of cars, moved by a switch engine from one yard to another in the breaking up and making up of trains, shall be subject to the air-brake provisions of the Safety Appliance Acts, Congress ought so to provide. The whole question turns upon two points: First, do the air-brake provisions of the Safety Appliance Acts apply to switching operations? Second, was the movement of the string of cars here involved a good-faith switching operation. We are sat-

isfied that the movement of these trains was as genuinely a switching operation as the old movement when terminal yards were less extended than they are now. Being of that opinion, and that the air-brake sections of the Safety Appliance Acts were not intended to apply to switching movements, we think the trial court committed error when it directed the jury to return a verdict in favor of plaintiff.

"At no time since the passage of the Safety Appliance Act in 1893 has it been the practice to couple up the air upon cars which were being moved in switching operations. This has been equally true whether the movement was upon sidings or upon main lines. At any time during the period referred to it has been possible to see hourly, not only at terminal points, but at any divisional point, such trains moving from one yard to another over the main lines of the road without coupling up the air. The same is true of trains moving from the yards of one carrier to yards of a connecting carrier at the same divisional point. It is true that such yards, as a rule, are less distant from each other than yards in the great terminal systems of important centers of traffic. It seems to us, however, impossible for courts to develop different rules according to the length or character of the main line that is used in such operations. The statute attempts to make no such classification, and, in our judgment, courts would be guilty of palpable legislation if they should attempt to do so.

"The most difficult problem that confronts railroads at the present time is to prevent strangulation of the arteries of commerce at these great terminal points. The traffic of half the continent at certain seasons of the year rushes down upon the centers. Thousands of cars have to be distrbuted and recombined daily in these terminal yards. There is no evidence in this record as to the time

> that would be consumed in coupling up 75 per cent. of the air on these transfer trains, but it was shown in a similar case (*Erie Railroad Company v. United States,* 197 Fed., 287, 116 C. C. A., 649) that it would take at least half an hour. In cold weather it would take considerably more than that time. The movement of the trains from one yard to the other at the rate of six to eight miles an hour would take less than 20 minutes. The result is that nearly twice the time would be consumed in coupling up the air that is needed for the brief movement of the train, and this with the clear certainty that at the end of the journey the air would have to be again uncoupled in order to distribute the cars. If such delay is necessary for public safety, all will agree that safety should be placed above speed. But in considering the shortness of the journey and the slowness of the speed, there is no evidence in this record that the safety of the public or of employes required the coupling up of 75 per cent. of the air on these transfer trains. Furthermore, the question is for Congress, and not for the courts."

It will be observed that several suggestions of that court specified certain lines of evidence which would be helpful to the court in determining the proper consideration of the statutes. We have in the present record evidence showing the structure of the yards in question; the method of handling the trains; the speed at which the transfer trains are moved; the time required to couple up the air; the amount of traffic in the several yards; the effect upon the movement of cars if the air were required to be coupled up, etc. The present case is far stronger from the railroad's standpoint. The evidence shows that the application of the statute to the circumstances of a case like this "would operate as an embargo upon com-

merce." It cannot be that such an effect was intended by congress. The result would be "strangulation," and not regulation of commerce.

Comment on cases cited in Government Brief.

The principal authority in the Circuit Court of Appeals relied upon by counsel for the Government is *Atchison &c. Ry. Co. v. U. S.*, 198 Fed., 637. The opinion in this case is quite brief and the facts are not entirely clear. It does not appear whether the movements were being made within one general terminal system, nor does it appear whether the trains in question were displaying markers so as to come within the definition of the word "train." Apparently the movements were on the main line. The opinion shows that the movements in question were from an "outer" yard to an "inner" yard, a distance of about eight miles over switching tracks, leads and main tracks, across a drawbridge and three railroads. The distinction between that and the instant case appears clear by quotation from the brief filed by the Government in the Circuit Court of Appeals, with a copy of which we have been favored. We quote therefrom as follows (italics ours):

> "'An endeavor is made in the brief of the plaintiff in error to make it appear that the train movement in question involved in these counts was a movement of cars *being switched from one part of the yard to the other.*'"
>
> "Now the facts in evidence show that this transfer train was made up at the yard at Corwith and was taken in a train consisting of an engine, 49 cars and a caboose to the yard at 21st Street, or 18th Street, a distance as testified by different witnesses, of from four to six miles. And this movement was over the main tracks of the railroad in ques-

tion which were in use for through trains, both passenger and freight.

"The evidence does not disclose that during the course of this movement cars were being continually switched in and out of the train, but it was a movement, from one yard to another, of a train or transfer as a connected whole for a distance of four to six miles over the main line of the defendant and crossing the lines of the Pennsylvania and the Chicago & Western Indiana. During the course of this movement it was liable at any moment to come in contact with regularly scheduled trains, either of its own or of the Pennsylvania or the Chicago & Western Indiana, and safety of operation required that its air brakes be used and operated. There is just as much reason why the train in question should have at least 75 per cent. of its air brakes used and operated as any other train that might be passing over the road at about the same time.

"Such movements as are disclosed in the evidence as to these counts cannot properly or fairly be designated as yard movements. There were yard movements before the train left Corwith. There were yard movements when the cars were distributed at 18th Street yard. *As to such yard movements strictly so-called, it might not be practicable to require the coupling up of the air hose.* That is not involved here.

"*But when trains leave the yard where they are made up and pass on to the main line of travel, as trains,* then there can be no reason why the provisions of the statute as to air brakes should not be complied with."

Counsel also cites the case of *United States v. Grand Trunk Ry. Co. of Canada,* 203 Fed., 775 (opinion of Judge Hazel, District Court, Western District of New York). The opinion in that case, however, shows that the facts are very different

from the instant cast. In stating the facts the Judge said: "The cars were not engaged in the "performance of a switching operation, nor were "they moving in the yard of the defendant com- "pany."

The same court, speaking through the same Judge in a later case (*U. S. v. New York Central &c. R. Co.*, 205 Fed., 428), followed the authority of the Circuit Court of Appeals for the Third Circuit in the instant case, saying:

> "The undisputed facts show that the train, consisting of 39 empty freight cars, only 25 of which were equipped with air brakes was transferred from the yard of the defendant at Charlotte Junction, N. Y., to its Rochester yard terminal, a distance of four miles, where the cars were customarily classified and inspected. The locomotive used to make the transfer was a yard locomotive, and the train or cars were moved for about two miles from the starting point over switching tracks to Kent Street in the City of Rochester, and from that point for the remaining two miles over track No. 4, which, although a through freight track, was also used for moving cars from the yards at Charlotte to the main yards at Rochester.
>
> "The evidence shows that the defendant uses different yards at Rochester, extending over a territorial distance of about six miles, all of which are under the control of a general yard-master, and that it is necessary, in operating cars in the yard limits and in moving them from one yard to another, to switch onto branch tracks running into industrial yards adjacent to the switching tracks, where such cars are loaded or unloaded, and then hauled away and assembled preparatory to proceeding on their journeys. Assuming that the locomotive and cars in question constituted a train, as that term is defined in Web-

> ster's Dictionary and in various adjudications cited in *United States v. Grand Trunk Ry. Co.* (D. C.), 203 Fed., 775, recently decided by this court, and assuming that in order to reach the main yards it was necessary for such train to go over part of the through highway over which interstate traffic was customarily transported, it must nevertheless, I think, be conceded by the government that the Safety Appliance Acts were never intended to apply to switching operations. *Erie R. Co. v. United States*, 197 Fed., 287, 116 C. C. A., 649. The primary object of the statute was to require railroads to equip trains engaged in interstate traffic with air brake appliances, so as to minimize the dangers to the passengers and crews; but obviously it was never intended to require such appliances to be coupled up or connected while cars are being hauled by a switching engine from one yard to another, or shunted out at different points, and are not actually engaged in interstate traffic."

Counsel also cites the decision of the District Court for the Western District of Michigan in the case of *U. S. v. Pere Marquette R. Co.*, 211 Fed., 220. It is true that the district judge in that case said that he would not follow the decision of the Court of Appeals for the Third Circuit in the instant case. The decision to which he referred was the one which was rendered when the case came before the Court of Appeals for the first time (197 Fed., 287). When the case again came before the Court of Appeals for the Third Circuit that court had before it the decision of the District Court in the Pere Marquette case and after a full discussion thereof came to the conclusion that the facts in that case were very different from those in the Erie case. The principal ground of the distinction was that in

the Pere Marquette case the track that connected the two yards which the railroad claimed form part of the general terminal "was not a nexus that served to correlate to two dependent yards, but was a hiatus or break between two independent yards." Other points of difference between the two cases are also pointed out in the opinion of the Circuit Court of Appeals (See 212 Fed., pp. 858, 9; Record, pp. 100, 101).

Counsel also cites the decision of this court in *Chicago &c. R. R. Co. v. United States,* 220 U. S., 559, wherein Mr. Justice Harlan quoted the language of Mr. Justice Vandevanter in *United States v. Atchison R. R. Co.,* 163 Fed., 517: "Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category." In making this quotation without further reference to the case in which Justice Vandevanter used this language, counsel is somewhat disingenuous. In the Atchison case the action was brought for hauling a car with a broken coupler. The quoted remarks were made in connection with a discussion of the case of *St. Louis &c. R. Co. v. Taylor,* 210 U. S., 281, and Mr. Justice Vandevanter pointed out that the nature of the duty placed upon the railroad company as found in Section 5, relating to *draw bars* (which was the section involved in the Taylor case), was the same as Section 2 relating to *couplers.* The question of the construction of the air brake sections of the statute was not before the court in the Atchison case; and in the case in 220 U. S., 559, the sole question was whether the statute imposed upon the railroad company the absolute duty (as held in the Taylor case) as distinguished from the exercise of reasonable care,

to equip its cars with the proper safety appliances, and to keep them so equipped. The question of the construction of the air brake sections of the statute was not involved nor considered.

Counsel lays stress upon the Taylor case, *supra*, as showing that the statute should be liberally construed. But in that very case this court said that the statute ought not to be given an absurd or unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. See 210 U. S. at page 295.

In *Johnson v. So. Pacific Co.*, 196 U. S., 1 (also cited by the government), this court pointed out that so far as related to suits to recover penalties the statute "in that aspect was penal" (p. 17).

Even in this suit for personal injuries due to defects in the safety appliances, some reasonable limit is imposed upon the application of the statute. Thus this court in *Pennell v. Phila. & Reading R. Co.*, 231 U. S., p. 675, held that the statute did not require an automatic coupler between the engine and the tender, affirming the Circuit Court of Appeals for the Third Circuit, 203 Fed., 681.

This case also points out that the custom of the railroads, while it could not justify a violation of the statute, might have an important bearing upon the meaning of the statute, especially when the custom has had the acquiescence of the Interstate Commerce Commission.

The original safety appliance act was adopted March 2, 1893, and with various amendments has been in effect ever since that date. The fact that the question of whether the statute was intended to apply to the movement of transfer trains has not been raised by the Commission until recently, justifies the inference (which is indeed a

matter of common knowledge) that the Commission for nearly twenty years made no attempt to enforce the act as to such movements and made no claim that it applied to such movements.

Further comments on Government Brief.

Counsel for the government, in discussing the "supposed hardship" resulting from a construction of the statute which would include transfer trains like those under consideration, says:

> "The hardship is more apparent than real. The coupling of air brakes on transfer trains would require little time, especially if done by additional yard men reserved for the purpose and if no tests were made. Testing of brakes would not be necessary if the railroad had theretofore performed its duty, since ninety percentum of the cars constituting these transfer trains would move in through traffic and supposedly had been previously inspected. Furthermore, the court in stressing this phase of the case, seemed to have overlooked the fact that seven out of eighteen trains moved from Bergen, where no congestion was claimed. Certainly, therefore, the crowded condition of the freight yard cannot be offered as an excuse for not coupling up the air on these trains. Furthermore, the record shows that defendant operated some of the power brakes in four of the trains in question, and during the pendency of this case, has 'been coupling up the air except on very few occasions' " (pp. 20-21 of gov. brief).

The record shows that the court below did not overlook the facts. It is quite true that seven out of the eighteen trains moved from Bergen, but it is not true that no congestion was claimed at that point. Exhibit D-2 (p. 94) shows that at that point the number of cars handled per month was from 26,000 to over 32,000 eastbound and from

12,000 to over 19,000 westbound, and that for a period of six months the total number of eastbound cars handled there was 178,891 and westbound the number was 93,475. These figures do not include cars received from and delivered to connections. At Bergen there were 18,780 of such cars in this six months period received from connections, and 14,696 delivered to connections. The figures at Bergen for this six months period were much greater than those at either Jersey City or Weehawken; thus in Jersey City the number of cars handled per month was from 15,000 to 18,000 in each direction, and at Weehawken from 4500 to 5400. The total number of eastbound cars handled at Jersey City for six months was 99,721; and westbound the number was 103,674. The total handled in Weehawken was 30,763 eastbound and 30,324 westbound.

The number received from connections in Jersey City was 11,381; the number delivered was 10,876.

The number received from connections in Weehawken was 19,772; the number delivered was 20,446.

The grand total of the number of cars handled at the three terminals for the six months from July 1st to December 31st, 1910 (being the period immediately prior to the dates on which the alleged violations occurred) was 632,599—each car being counted once, without considering the number of times it is necessarily moved in shifting around from one point to another of the terminal.

If we allow an average of thirty working days to the month, or one hundred and eighty days for the period of six months, it will be seen that in this terminal the average number of cars

handled per day was 3,514. While it is true that there are more tracks in the Bergen yard than in either the Jersey City or Weehawken yards, it is also true that more cars were handled in that yard than in either of the other two. The record shows that since these figures were compiled there had been a large increase at certain times so that the totals would be greater after January 1, 1911, than they were before that date (pp. 58, 59).

If we allow forty feet for each car, the result is that the standing room alone required *each day* for these cars would be over twenty-six miles. (40 x 3514, the daily average.) The reason for the necessity of extending the terminal yard beyond the Palisades thus becomes apparent. There is simply no room on the river front for a yard or yards big enough to handle this immense number of cars. This fact was commented on by Judge Orr in his remarks in directing a verdict for the defendant, saying:

> "There is nothing strange in the railroad company extending its yards in the direction of least resistance. Of course it can remove rock but it is tremendous expense, perhaps to make room where a mountain has been standing; and it appears from the evidence that the line of least resistance, the least expense and there is other resistance because one railroad company cannot take the property of another for this purpose, is in the direction where these yards have been extended, namely towards the Hackensack River" (p. 145, l. 30 to p. 146, l. 1).

The record shows that it would take from 20 to 30 minutes to couple up the air hose as distinguished from both coupling and testing (p. 83). But to do both would require from one hour and twenty minutes to one hour and twenty-five min-

utes for a drag of cars containing from twenty-five to thirty-five or forty cars (p. 69). It will therefore be seen that the average time required for putting the air brakes in operative condition and making sure that they were in such condition would be about one hour for each transfer train. The Interstate Commerce Commission itself has recognized the necessity of facilitating so far as practicable the movement of traffic, as well as handling it, with greater economy. This was pointed out by the Commission in discussing the question of what date should be fixed for the increase of the percentage of air brakes. See *In Re Power or Train Brakes,* 11 Interstate Commerce Reports, 429, at p. 436.

We submit that the necessary delay, inconvenience and expense involved in a literal compliance with the statute should be considered in the effort of the courts to arrive at a correct construction thereof.

It is quite true that after the first trial of this case some attempt was made by the defendant to comply with the statute by coupling up the air brakes (p. 73). *But the brakes when coupled were not tested* (p. 79). The testing of the air brakes is quite as important as the coupling, as it is only by testing that the fact as to whether they are operative can be determined (p. 69). Even this was abandoned after the resulting congestion caused the loss of several cars of fruit, and a threat of a diversion of the business (p. 70).

But counsel in this argument overlook the fact that the proper use of air brakes requires something more than merely coupling the hose together. The hose must be *tested.* This is done

by pumping up the air to a certain pressure which is measured by the "piston travel"; and if any holes develop by this test they must be repaired. For road service the air brakes are tested as well as coupled (p. 69, 70). Even to couple up the air without the test requires at least two extra men at Jersey City and Weehawken and five or six extra men at Bergen (p. 79). The statute requires not merely that the hose through which the air passes be coupled, but the brake system must be so equipped that it can be operated by the engineer on the locomotive. It is obvious that this requires a test of the air brakes as well as the coupling of the hose.

Counsel suggests that the testing of the brakes would not be necessary if the railroad had performed its duty, as ninety per cent. of the cars were moving in through traffic. This argument is based on a misapprehension of the facts. It is quite true that many and perhaps most of the cars on the transfer trains were *ultimately* destined to points outside of New Jersey and in that sense were moving in through traffic. But it is not true that at the time the transfer movements were made the cars were *then* engaged in such movement; on the contrary the evidence shows without dispute that the transfer trains which moved from Jersey City and Wehawken to Bergen, were there broken up and the cars reassembled for the appropriate road trains, according to final destination, and the transfers moving from Bergen to Jersey City and Weehawken had in turn been broken up at Bergen and there reassembled into transfers for the purpose of further movement to the tide water yards at Jersey City and Weehawken, whence they were carried by floats to final destination in New York Harbor and other points.

The suggestion of counsel that no tests be made can be best answered in the words of the Circuit Court of Appeals in the instant case:

> "In this connection we pass by as untenable the contention of the government that part of the delay might be avoided by dispensing with testing; that the government officers would be satisfied with coupling. We cannot accede to this, and we think on mature reflection it would not be pressed. It suffices to say that if Congress meant that cars were to be air coupled while being switched, it did not intend to relieve the railroad from a thorough inspection of such couplings before they were used. It would not only be negligence for the company to fail to so inspect, but the manifest injustice of leading men to place reliance on the efficiency of untested appliances borders so near on positive and misleading wrong that we dismiss such contention without further discussion." (212 Fed., 861; Record, p. 103.)

II.

The action of the Trial Court was correct in directing the jury to return a verdict in favor of the defendant as to counts numbers one to eight.

Numbers of Defective Cars.

If we are right in the argument that the statute has no application to the movement of cars mentioned in counts 9 to 26, there is little more to be said as to the cars mentioned in counts 1 to 8. It will be seen by reference to the table in which is given a list of the car numbers, the origin, destination, &c., that all defective cars were moved *to* Bergen in the transfer trains which are included in the list of such

trains that are alleged to have been moved in violation of the air-brake provisions of the statute. Thus car 1442 in count No. 1 was moved to Bergen in the transfer train described in count 9; cars 03831 in count number 2, and 106812 in count number 3, were moved in transfer rtain described in count number 10; cars 69662 in count number 4 and 29478 in count number 5 were moved in transfer train described in count 14; cars 66749 in count number 6 and 101062 in count number 7 were moved in transfer train described in count number 20 and car 11049 in count number 8 was moved in transfer train described in count number 12.

Conclusions of Court of Appeals.

The Circuit Court of Appeals in the instant case said with respect to these eight cars (there being one car in each count).

> "As to the remaining eight counts, we need only say as we did in our former opinion, that as therein indicated our disposition of the main case disposes of these matters." (212 Fed., p. 861. Record, p. 103.)

Turning to the former opinion, we find that the Circuit Court of Appeals there said:

> "If the jury finds such to be the case (that is that the movements in question were yard movements and that the Bergen, Jersey City and Weehawken yards together were in fact a single shifting yard, and that the car movements in and between the same were switching operations), such finding would seem to dispose of the questions raised by the first eight counts as to the duty of the railroad in reference to the cars whose equipment was found to be defective. So far as the proofs show, these defects were

discovered during the classification and inspection made in the terminal. Such being the case, and there being a repair shop provided in such terminal, there is no reason why the railroad should not be permitted to move the defective car from any part of the terminal to such repair shop, and there is every reason why the car should be shifted to that point and every facility for repair there used, nor is there any provision in the statute which forbids such movement in a switching yard." (197 Fed., 292.)

Cars Moved for Purpose of Repair.

As in the case of counts 9 to 26, so in the case of counts 1 to 8, there was no disputed question of fact. It was agreed that all of these 8 cars were hauled to Bergen—6 of them coming from Weehawken; the other two from Jersey City. It was also agreed that there was a repair track at Jersey City where five of the cars could have been repaired, if repair tracks of sufficient capacity were available at that point. It was also agreed that at Weehawken the company maintained a force of six men to inspect cars and make light repairs.

Counsel for the Government argues that there is an absence of proof that these cars were moved for the purpose of being repaired. We do not concede that the burden of proof was upon the defendant with respect to this fact; on the contrary we think that when there is no evidence as to where the cars had become defective and the only evidence on the subject is that they were found defective in one part of the general terminal and were thereafter moved to another part of the same general terminal in transfer trains, the burden is on the Government to show that such movement was not for the

purpose of repairs. But this question is academic, because there is sufficient evidence in the record, we submit, to justify the inference that the movements of the cars were for the purpose of repair. It appears, without dispute, that all of the cars were moved to the yard known as Bergen; that at that place was located what is known as the "Penhorn shop" (p. 54). A so-called "cripple" yard is maintained at that point, consisting of about eight tracks and a shop. *All cars that are crippled and not assembled (other than some light repairs) are sent to that point and placed in the "cripple" yard, and after being repaired are then put in line to go to destination* (p. 63). It was shown by the Government's own witnesses that at least some of these eight cars were empty (p. 42); and there is no proof that any of them were loaded. The only movements of any of the cars that were proved were the movements to the Bergen Yard, where are located the cripple tracks and the repair shops. The Government's witness admitted that some of theses eight cars were marked for the shops by a tag indicating that they were to be taken there (p. 42).

Moreover, there was nothing in the opening of the trial counsel of the Government to suggest that any question was raised as to whether or not these eight cars were moved for the purpose of repairs; on the contrary, counsel stated explicitly that the *whole* question will be—"Are those terminals one yard, or are they considered separate and distinct yards?" Counsel further stated (as incidental to the first general statement), that another question will be whether each of the "transfer drags" was a train; another question is—"Was the movement of each

of those a switching movement or a transfer movement?" (p. 36). Furthermore, in the argument of the motion to direct a verdict counsel reiterated that the question was—Was this a switching movement? (p. 82). Finally, in the requests to charge submitted on behalf of the Government, the only points that were raised related to the application of the air-brake provisions of the statute to transfer movements. Of the fourteen requests to charge, not one of them suggests that there was any question but what these eight cars were moved to the repair shop of Bergen for the purpose of repairs. This appeared so clearly at the trial that in discussing these eight counts the Trial Judge said:

> "The first eight counts covered the cars that were required to be repaired, and the evidence shows that it was reasonable, necessary and proper that these cars should be taken to the nearest repair shop for that purpose, or placed upon the repair track, or in some convenient place where the repairs could be made" (p. 85).

Specific exceptions were taken at the trial to the refusal of the Court to charge as requested but at no time was there any hint that trial counsel desired to have the Court submit to the jury the question of the *purpose* for which these eight cars were moved. It is not conceivable that the trial counsel for the Government was deliberately striving to entrap the Court and opposing counsel by propounding a stipulation which should purposely omit what counsel considered to be an important issue in the case; but now we find that after judgment has been entered in favor of the company and affirmed by the Court of Appeals, other counsel attempt to base

their argument on matters which were not fairly presented to the Trial Court. We submit, however, that in view of the undisputed testimony that it was the practice of the company to send cars to the Penhorn shop at Bergen for the purpose of repairs, that these cars all moved in transfer trains that went only as far as Bergen, and that some of them were marked for the shop, the only reasonable inference from the entire record (especially in the light of the theory on which the case was tried by counsel for the Government) is that these eight cars were moved for the purpose of repair, as was twice concluded by the Circuit Court of Appeals when the case was presented to it.

Necessity for Moving Cars for Repairs.

While it is true, as appears from the stipulation, that the repairs necessary for some of the cars could have been made on the repair track at Jersey City, it is also true that that track has a limited capacity, and the repairs could not have been conveniently and reasonably made on such track without interference with the normal operation of the railroad. The Jersey City track was used only in cases of emergency. At that point seven men were employed, counting the day and night force; whereas at the main shop at the Bergen yard there are one hundred men employed (p. 54).

If the argument of counsel for the Government is sound, a carrier, when it finds a car to be defective, whether it be out on its line, or within the yard limits, must refrain from moving that car until the defect is repaired. The practical absurdity of such construction is illustrated by the fact that there are many repairs that cannot

be made at all without moving the car to a repair shop, and there are other repairs which would take a long time even if made while the car remained on the track where the defect was discovered; for example in the present case, the defect mentioned in count five would take two men about two hours (p. 65, l. 10). The result would be that all movements on the track on which the defective car happened to be standing, would have to be stopped; and in those cases where the repairs could not be made while the car was on the track, the only thing to do would be to blow up the car with dynamite, or load it on a flat car and transport it to some point where the repairs could be made. We do not believe that the Government can seriously maintain such a position, although it is the necessary logical result of the argument.

It will be noted that in the present case, the movements of the defective cars both from Jersey City and Weehawken, were to the *nearest repair shop;* and in both cases the distance was only two or three miles. We submit that the statute does not require even light repairs to be made while the cars remain standing on the tracks at the particular point where the defect happens to be discovered. Even if there was a repair track at Jersey City with a very limited capacity, there would be no advantage in moving these defective cars to that track—especially in view of the undisputed evidence as to the immense amount of traffic and the congested condition of the easterly terminal of this railroad. If no convenient shop or no "cripple" yard had been provided by this defendant, then the Government might reasonably contend for a strict enforcement of the statute in the present case. But there is nothing in this record to suggest that the defendant so

far as relates to the movements of these cars, did anything but what was reasonable and both morally and legally justifiable. The mere fact that the defendant maintained several repair men at Jersey City and also at Weehawken, does not impose upon the defendant the *obligation* of making repairs at those points when another point within the same yard is equipped with a considerable number of tracks and a convenient shop where all repairs, both light and heavy, can be made quickly and conveniently, and where a large force of one hundred repair men is maintained for that very purpose. The evidence shows that it was not only more convenient to make the repairs at Croxton, but in view of the congested condition of the Jersey City Yard, it was much safer for all concerned to make the repairs at the shop provided for that purpose.

Decisions re Movement for Purpose of Repairs.

We submit that a carrier (at least before the supplement of 1910, of which more infra) had the right to move cars from one part of a yard to another part thereof without incurring the penalty of the statute, provided such movement was reasonably necessary to make repairs. The cases cited on the Government brief do not justify a contrary conclusion.

Thus, in the Delk case, 220 U. S., 580, the defective car was not being moved to a repair shop

In *C. B. & Q. R. R. Co. v. U. S.*, 220 U. S., 559, the question of the right to move a defective car to the nearest shop was not involved; the only point decided was that proof that the company did not know that the cars were out of repair and had no actual intention of violating the law would not be a defense.

In *St. Louis etc. R. R. Co. v. Taylor*, 210 U. S. 281, the question as to the right to move defective cars to a repair shop was not involved. The accident in that case occurred while the train was out on the main line of the railroad. The train had stopped at a station for the purpose of leaving two cars that were in the middle of the train; the train was separated, and the accident happened while Taylor was trying to make a coupling between the two sections of the train.

In many other cases in the Federal Courts, it has been decided that a carrier may move defective cars so far as such movement is reasonably necessary for the purpose of making repairs.

In *U. S. v. Southern Pacific Co.*, 154 Fed. 897 (District Court, Ore., suit was brought to recover the penalty under the statute. The principal question was whether the defective cars should have been taken to the shops for repair before being carried to the terminal yard for unloading. It appeared that the cars were first taken to the yards and thereafter to the shop. Held that such movement was a violation of the statute. The Court said however:

> "Admittedly, if a breakage occurs between stations where repair shops are located, and the repair cannot be made without taking the car to such a place, the company cannot be held liable until it has had the opportunity of making the repair, and in that event it would be justified in hauling the car in the train to the succeeding station where such repairs could be made" (p. 901).

In *U. S. v. Louisville & N. R. R.*, 156 Fed. 195, (District Court, Ky., held, the defendant was not liable for moving a defective car to a repair track even though on the way to the repair track the car

was unloaded at the place of business of the consignee.

In *U. S. v. Chicago, etc., R. Co.*, 162 Fed. 775, (District Court, Ia.), held, that when cars become defective in the course of transportation, the company may haul the same to the nearest point without being subject to the penalty of the statute.

In *Chicago etc. R. R. Co. v. U. S.*, 168 Fed., 236, (Circuit Court of Appeals, Eighth Circuit, held that a movement of a defective car alone, for the purposes of repair, does not make the company liable. The Court said:

> "The object of the safety appliance statutes was manifestly to require interstate carriers to maintain their rolling stock in a certain condition of safety. It could not have been the intention of Congress to impose this duty upon carriers, and at the same time deprive them of the only practical method of meeting its requirements. Rolling stock must necessarily become defective, within the terms of these statutes, both by use and by accident. Repair shops cannot be kept on wheels. Such shops can not be brought to the defective vehicle. The only practical method of railroading requires that such vehicles when out of repair, shall be taken to the shops; and if they are wholly excluded from commercial use themselves, and from other vehicles which are commercially employed, they do not fall within any of the classes covered by the safety appliance acts. A carrier may move one or more cars by themselves to repair shops, for the purpose of having them placed in a condition to conform to the safety appliance acts, without being guilty of a violation of those acts while thus engaged in an honest effort to meet their requirements."

This case was followed by the same Court in *U. S. v. Southern Pacific Co.*, 169 Fed., 407; and again in *U. S. v. Rio Grande Western R. Co.*, 174 Fed. 399.

In *Chicago Junction R. Co. v. King*, 169 Fed. 372 (Circuit Court of Appeals, Seventh Circuit, (affirmed 222 U. S. 222), the company was held liable, but only for the reason that the Court held that the jury were justified in finding that "it was reasonably practicable" to repair the defective car without moving it.

In *Siegel v. N. Y. C. etc. R. Co.*, 178 Fed. 873, (Circuit Court, Middle District, Pa., held that the company was not liable when it appeared that the defective car was being shifted in a yard for the purpose of repairing the defect. In the course of the opinion the Court said:

> "Repair shops as it is pertinently said, cannot be kept on wheels; and a carrier may therefore move one or more defective cars by themselves to such shops, for the purpose of having them put in a condition to conform to the requirements of the safety appliance acts, provided such cars are excluded from commercial use themselves, and from connection with other cars which are being used commercially. And much more may a crippled car be shifted about upon the tracks of a railroad yard, in order to separate it from others, and put it where it can be properly attended to. *Taylor v. Boston & Maine R. R.*, 188 Mass. 390, 74 N. E., 591; *United States v. Rio Grande Western R. Co.*, 174 Fed. 399; *St. Louis, etc., R. R. v. Delk*, 158 Fed. 931, 86 C. C. A. 95, per Lurton, J. The law requires nothing so impracticable as that it should be allowed to stand blocking the way wherever it may chance to become crippled, until the means for remedying

the defects can be brought to it and the defects cured."

In *Southern R. Co. v. Snyder*, 187 Fed., 492 (Circuit Court of Appeals, Sixth Circuit), the cases above cited from the Circuit Court of Appeals, Eighth Circuit, were approved.

In *U. S. v. Baltimore & Ohio R. R.*, Kent's Index Digest, p. 264 (U. S. District Court, W. Va.), the Court charged that if the company maintains repair shops or repair material, it has the right in the ordinary operation of the trains between repair points, when a train is in operation and defects arise, to carry the defective car to the first repair point.

In *U. S. v. Colorado Midland Ry. Co.*, 202 Fed. 732, (Circuit Court of Appeals, Eighth Circuit, December, 1912), it was held that the Act of 1910 was not retractive, but the question of the right to haul cars in the yard for purposes of repair, was not involved, as it appears that the cars in question, after they became defective, were moved on the main line for a distance of 77 miles.

Supplement of 1910.

Thus far we have considered the case without reference to the supplement of 1910. It seems to us that this supplement cannot be considered in view of the requests to charge submitted on behalf of the Government to the effect that the provisions of that act are not applicable for the reason that the occurrences were before the passage of said act, and said act was not retroactive (see request to charge number one, p. 83). That being the theory on which the case was presented at the trial, counsel cannot now

come before the Court and attempt to reverse the Trial Court on some other theory.

The general rule on this subject may be stated as follows:

> "A party is bound by the theory of the case presented by the instructions given at his instance, and it is proper to refuse instructions requested by him which are inconsistent with other instructions given at his request; and where several instructions are requested, some of which are inconsistent with the others and involve different theories of the case, a party submitting such instructions cannot complain of the Trial Court in adopting one of the theories of the case and giving the instructions applicable thereto and refusing those which are inconsistent with the ones given." 38 Cyc., 1711.

In a recent decision of the New Jersey Court of Errors and Appeals it is said:

> "When inconsistent requests to charge are preferred, doubtless the party cannot be heard to complain of the Court's selection, because even if a wrong one is selected and an erroneous charge made, it was induced by the party's own act". (*Kosher Dairy Co. v. New York, Susquehanna & Western Railroad Co.*, opinion filed Sept. 25, 1914, not yet reported.)

Possibly counsel may have had in mind the provision in section one of the Supplement of 1910, providing that certain safety appliances must be furnished by carriers on or before July 1, 1911. But, however that may be, there was a direct request to the Trial Court to the effect that the act of 1910 had nothing to do with the case.

But let us assume, for the sake of argument, that the act of 1910 was in effect and that coun-

sel now have the right to rely upon it in this case, notwithstanding the contrary attitude taken at the trial. Section 4 of the Supplement provides that when the equipment becomes defective while the car is being used by a carrier "upon its line of railroad", the car may then be hauled from the place where the equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired without liability, &c. But here we have a case where the equipment did not become defective while the cars were being used upon a line, but they were found defective *in a yard*, and thereafter the movement that was made was to the nearest repair shop,—*which was located in another part of the same yard.*

It will further be observed that the supplement of 1910 does not *prohibit* the hauling of defective cars to repair points, but, on the contrary, expressly permits it under certain conditions. The statute was obviously intended to apply to cars found defective on the "line" of railroad as distinguished from the yards or terminals.

In *Galveston etc. Ry. Co. v. United States*, 199 Fed. 891, (Circuit Court of Appeals, Fifth Circuit, October, 1912) suit was brought to recover penalties for operating a train without having the required percentage of air brakes in operative condition. The brakes were all right when the train started, but while on the line of the railroad the air pump of the engine broke, thus making it impossible to further use the air brakes. At the place where the pump broke, there was a siding where the train could have been placed and the pump repaired by bringing the necessary materials and workmen from a repair shop located at another point. The train was moved to

this other point—a run of forty to fifty minutes. Judgment entered in favor of United States was reversed, the Court holding that the Act of 1910 should be considered as a congressional construction of the original Act of 1893; and that defendant was not liable for the penalty under the act, in moving a locomotive or train to the nearest repair point for the purpose of repairs. One of the judges dissented, and another while concurring in the judgment of reversal, filed a separate opinion to the effect that the question of liability was for the jury on the point as to whether the movement made was reasonably necessary.

In *U. S. v. Trinity, &c., Ry. Co.*, 211 Fed., 448, the supplement of 1910 was again under consideration by the Circuit Court of Appeals for the Fifth Circuit, and it was held that the railroad company could not bring itself under the proviso of section four of that supplement unless the movement of the car was necessary to repair the defect and the repair could not have been made at the repair point to which the car was moved. But the proof in that case showed that the movement of the defective car was on a through freight train on the main line of the company. The question of the movement of the defective cars *in a yard* was not involved.

Of course in the present case there is no occasion to consider the question of the right to move to the nearest repair point, cars that are found defective on main line. The case depends rather upon whether or not the defendant had the right to move defective cars from one part of a terminal to a repair shop located in another part of the same terminal; and this in turn de-

pends upon whether the three points called "Jersey City," "Weehawken" and "Bergen," constitute three separate and distinct yards, or only one yard. The evidence on this subject is cited at length under Point I; we submit that this shows beyond dispute that these yards were parts of the same general terminal.

It should further be observed that under this supplement the movement of defective cars is permitted "to the nearest available point where such cars can be repaired." Even if the supplement can be construed to apply to cases where cars are found defective in a yard, still it appears in the present case that all of the cars in question were taken to the *nearest repair shop.*

The statute permits such movement to the "nearest available point." Can this be construed to mean that cars found defective in a yard can be moved only to a repair *track* in such yard or that they must be repaired without moving at all? While it is true that as to some of the cars in question, so-called "light" repairs could be made while the car was standing on the track without taking it to the shop, is the company bound at its peril to distinguish between light repairs and heavy repairs, and make the former while the car stands on the track, even when it has provided within the limits of the same general yard a large repair shop with an aoundant force of repair men (in the present case one hundred), and with plenty of room to store defective cars pending repairs. The word "available" as used in the statute must be given a reasonable meaning, and we submit that the statute cannot be construed to require the company to make repairs in the yard in all cases where it might be literally *possible* to make them without further

movement, nor does it require the company to move such cars to the nearest *track* where such repairs might be made when it appears that by great inconvenience and delay such repairs might be made. Moreover, for all that appears, the movement of the cars in question from that part of the yard where they were found to be defective to the repair track in Jersey City, might have been fully as long as the movement that was in the fact made to the Bergen shops, two miles distant.

The word "available" is defined in the Standard Dictionary as follows:

> "Capable of being employed or made use of *with advantage;* suitable for the accomplishment of a purpose; usable; at one's disposal; profitable; sufficient in power or efficacy for producing the desired result; effectual; valid."

The definition fairly justifies the movements made in this case to the nearest shop. The only movement which is shown of any of these defective cars is a movement made to the nearest repair shop in order that the defects might be repaired. If the statute means anything, it must mean that the carrier may move the car to the nearest point that is available—that can be "made use of with advantage." The statute cannot be fairly construed to prohibit the movement of cars to repair shops, when defects are discovered during the classification and inspection in a terminal.

The question is, not whether defective cars may be *used,* but whether the movement of a defective car from one part of a yard to the nearest shop in another part of the same yard is permissible under the statute.

Counsel, in discussing this supplement, also urged that the defendant pleaded only the general issue, and that no evidence was adduced to show that the cars in question fell within the proviso of the supplement. In making this argument, counsel overlooks section 104 of the New Jersey Practice Act of 1903 (which was in effect at the time this suit was instituted) which permitted plaintiff to make demand for specification of defenses intended to be made under the plea of general issue, and required the defendant at the trial to limit his defenses to those specified in answer to this demand. No such demand was made in the present case, and hence the defendant was not limited to a mere general denial.

Counsel cites the cases of *Chicago, etc., R. Co. v. United States*, 211 Fed., 12; *United States v. Pere Marquette, R. R.*, 211 Fed. 220, and *United States v. Chesapeake & Ohio R. Co.*, 213 Fed., 748.

It may be observed that the case first cited is strong authority for the *defendant* with respect to the construction of the air brake section of the statute. While it is true that in that case the court held that the supplement of 1910 applied to switching operations as well as to movements "on the line," it is also true that there is nothing in that case to show that the movement of the defective car was for the purpose of repair,—in fact the opinion showed that the movement was *not* for that purpose.

The *Pere Marquette* case has already been discussed under Point I and the distinction between that case and the instant case has been shown. So far as concerns the point now under consideration, the opinion shows that the defective cars were

moved for the purpose of being unloaded or for a re-arrangement of their cargoes and not for the purpose of making repairs.

In the *Chesapeake & Ohio* case also, it appears that the movement of the defective car was not for the purpose of repairs but merely as a matter of operating convenience.

III.

There was no dispute as to the facts and hence verdict was properly directed as to all the counts.

Further Comment on Government Brief.

Counsel urge that the Court of Appeals erred in sustaining the action of the trial court and directing a verdict in favor of the defendant and in not directing a verdict in favor of the government "or at least in not submitting the case to the jury with the instructions requested by the government."

We find no fault with the suggestion that it was the duty of the trial court to direct a verdict—of course, however, insisting that the verdict should have been directed for the defendant. But we must protest against the suggestion that there was any question to be submitted to the jury. We do not see how the present argument of the government on that point can fairly be made in the face of the requests submitted by the government to the trial judge. Those requests or some of them in effect amounted to a request to *direct* a verdict for the government. For example, see Nos. 2 and 3, p. 83.

Effect of Request by Both Parties for a Directed Verdict.

Counsel for the defendant also requested the trial court to direct a verdict in its favor. Hence we have a situation where both parties requested a directed verdict. This amounts to an admission by both that there is no disputed question of fact for the jury.

See

Empire State Cattle Co. v. Atchison &c. Ry Co., 210 U. S., 1;
American National Bank v. Miller, 185 Fed. 338; 229 U. S., 517;
Sena v. American Turquoise Co., 220 U. S., 497; 55 L. Ed., 559;
Stratton's Independence v. Howbert, 207 Fed., 419;
Schlottmann v. E. I. duPont deNemours Powder Co., 210 Fed., 356;
St. Louis &c. Ry. Co. v. S. Samuels & Co., 211 Fed., 588.

Result, if Question is Submitted to Jury.

We have shown under Points I and II that the verdict was properly directed for the defendant as to all of the twenty-six counts, but in view of the argument now made by counsel for the government let us consider the necessary result if the argument should prevail that there was some question for the jury to pass upon.

There are twenty-six separate and distinct alleged violations of the statute—eight for defective safety appliances and eighteen for failure to comply with the air brake sections.

Under the local practice in the State of New Jersey the Government combined all of these separate cases into one. Suppose that each case was tried before a separate jury; the facts in each action are precisely the same as in all the other actions—except that in the defective appliance cases, there is a variation as to the nature of the defect. Let us suppose that in the first case, the question of the defendant's liability is left to the jury and that Government obtains a verdict; the next day, at another trial, before another jury, under exactly the same facts, the verdict might be for the defendant; at the trial of the third case, the verdict might again be for the Government; and at the trial of the fourth case, it might be for the defendant; and so the pendulum would swing from one side to the other, according to the viewpoint of the particular jury, although the cases involve exactly the same facts, and the result would be that there would be no legal rule announced that would serve to inform either the Government or the Company what their legal rights and duties were in the premises.

Practically every day and several times a day since this suit was started in June, 1911, transfer trains have been operated at the Jersey City Terminal without complying with the statute. Suppose a series of suits was brought to recover the penalty for each such operation, on the theory that the operation of each such train without the air brakes coupled up was a violation of the statute; the result would be an endless litigation in part of which the Government might be successful and in the other part of which the Company might prevail—according to the verdict of the jury in each case. Yet the state of facts would be iden-

tical in all such cases. The litigation might thus be continued indefinitely without any practical result. Such a state of affairs would be a travesty.

Authorities Re-Direction of Verdict.

We submit that as the facts were undisputed the trial court was bound to direct a verdict for one party or the other.

In *Chicago etc. Ry. Co. v. U. S.*, 220 U. S., p. 559, Mr. Justice Harlam quotes with approval from the case of *Hepner v. U. S.*, 213 U. S., 103, at p. 108, the statement that it was "fundamental in the conduct of civil actions that the court may withdraw a case from the jury and direct a verdict, according to law, if the evidence is uncontradicted and raises only a question of law."

In *Patton v. Texas & Pacific Railway Co.*, 179 U. S., 658, the Supreme Court laid down the rule as to the duty of the trial court to direct a verdict, in the following language:

> "That there are times when it is proper for a court to direct verdict it is clear. It is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." *Phoenix Ins. Co. v. Doster*, 106 U. S., 30, 32; *Griggs v. Houston*, 104 U. S., 553; *Randall v. Baltimore & Ohio Railroad*, 109 U. S., 478, 482; *Anderson County Commissioners v. Beal*, 113 U. S., 227, 241; *Schofield v. Chicago & St. Paul Railway Co.*, 114 U. S., 615, 618; *Delaware &c. Railroad v. Converse*, 139 U. S., 469, 472. See

also *Aerkfetz v. Humphreys*, 145 U. S., 418; *Elliot v. Chicago, Milwaukee &c. Railway*, 150 U. S. 245."

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & Danville Railroad v. Powers*, 149 U. S., 43."

"Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

While the opinion from which this quotation was taken in a suit to recover damages by reason of negligence there is no reason why the same principle should not apply to any other case at law. The same rule was applied in *Chicago &c. Ry. Co. v. U. S.*, 220 U. S., 559, in which the Supreme Court affirmed a judgment entered upon a verdict directed in favor of the government in a penalty suit under the Safety Appliance Statute. If it is right to direct a verdict for the government in a case of this kind when the facts are undisputed and the construction of the statute

adopted by the court leads to such direction, in like manner a verdict should be directed for the defendant when the facts are undisputed and the adopted construction requires such action on the part of the trial court.

Moreover, it should be remembered that this case involves the construction of a statute; and it is well settled that the proper construction of a statute is a question of law for the court, and should not be submitted *to* the jury. 36 Cyc. 1102.

It is the duty of the court to construe a statute and to state whether a case that rests on undisputed facts is within the statute; and it is error for the court, under such circumstances, to submit to the jury the application of the statute to the case. *Winchell v. Town of Camillus,* 95 N. Y. S., 688, 109 App. Div., 341, affirmed 83 N. E., 1134, 190 N. Y., 536.

In *Central R. Co. v. Young,* 200 Fed., 359, the Circuit Court of Appeals for the Third Circuit held that the question of the meaning of a certain rule with regard to the operation of engines within yard limits was a question of *law*, and not of fact, citing *Chicago &c. R. Co. v. Ship,* 174 Fed., 353.

To the same effect see the following:

Belt v. Marriott, 9 Gill., 331 (Md.);
O'Donnell v. Glenn, 23 Pacific, 1018, 8 L. R. A., 629 (Mont.);
Berliner v. Town of Waterloo, 14 Wis., 378;
People v. Peden, 109 Ill. App., 560;
Christiansen v. William Graver Works, 79 N. E., 97, 223 Ill., 142;
Ayres v. United States, 44 Ct. of Cl., 110;
Trustees v. Board of Education, 132 S. W., 182, 141 Ky., 126;

Commonwealth v. London, 149 S. W., 852, 149 Ky., 372;
City of Boston v. Boston Elevated Ry. Co., 100 N. E., 601 213 Mass., 407.

Conclusion.

We therefore respectfully submit that on the undisputed facts of this case there was no question to be submitted to the jury and that the decision of the Court of Appeals should be affirmed.

GILBERT COLLINS,
Counsel for Erie Railroad Company, Defendant-in-error.

Dated, November 27, 1914.

APPENDIX.

Safety Appliance Acts.

An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact,

and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this Act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this Act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this Act.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and side of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this Act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in inter-

state commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. (*As amended April 1, 1896.*) That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation to be recoverd in a suit or suits to be brought by the United States District Attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been commtited; and it shall be the duty of such District Attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, that nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

SEC. 7. That the Interstate Commerce Com-

mission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this Act.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

AN ACT to amend an Act entitled, "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers, and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions and requirements of the Act entitled, "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purpose," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the coup-

lers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three as amended by the Act of April first, eighteen hundred and ninety-six, or which are used upon street railways.

SEC. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen

hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States District Attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements, and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

AN ACT TO supplement "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes and for other purposes," and other safety appliance Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this

Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided*, that in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing shall designate the number, dimensions, location and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three, and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the Commission may deem proper, and thereafter said number, location, dimensions and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act; *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of

this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission.

SEC. 4. That any common carrier subject to this Act using, hauling or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six; *Provided,* That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure the nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the

Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this Act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

SEC. 5. That except that, within the limits specified in the preceding section of this Act, the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States attorney from any of the provisions, powers, duties, liabilities or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three; and, except as aforesaid, all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as

amended by the Acts of April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, shall apply to this Act.

SEC. 6. That it shall be the duty of the Interstate Commerce Commission to enforce the provisions of this Act, and all powers heretofore granted to said Commission are hereby extended to it for the purpose of the enforcement of this Act.

That the jurisdiction of the Interstate Commerce Commission to extend the period within which any common carrier shall comply with the provisions of section three of the Act entitled "An Act to supplement 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' and other safety-appliance acts, and for other purposes," approved April fourteenth, nineteen hundred and ten, shall apply to cars actually placed in service between the date of the passage of said Act and the first day of July, nineteen hundred and eleven, in the same manner and to the same extent that it applies to cars actually in service upon the date of the passage of said Act (36 Stat. L., 1397).

UNITED STATES *v.* ERIE RAILROAD COMPANY.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 580. Argued December 18, 1915.—Decided May 3, 1915.

Railroad yards belonging to the same railroad but several miles apart, such as those of the Erie Railroad at Jersey City, Weehawken and Bergen, although important accessories of the same terminal are not actually one yard, and trains moving between them are not engaged merely in switching operations, but are engaged in transportation within the purview of the air-brake provisions of the Safety Applisnce Act.

212 Fed. Rep. 853, reversed.

THE facts, which involve the construction and application of the Safety Appliance Acts, are stated in the opinion.

Mr. Assistant Attorney-General Underwood for the United States.

Mr. George S. Hobart and *Mr. Gilbert Collins* for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a civil action by the United States to recover from the Erie Railroad Company a penalty for each of

several alleged violations of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531, as amended and supplemented by the acts of April 1, 1896, c. 87, 29 Stat. 85; March 2, 1903, c. 976, 32 Stat. 943; and April 14, 1910, c. 160, 36 Stat. 298.

The declaration contained twenty-six counts. The first seven were based upon the use of that number of cars having defective couplers, the eighth upon the use of a car without grab irons or handholds at one end, and the remaining eighteen upon the operation of that number of transfer trains in which less than eighty-five per cent. of the cars were controlled by air brakes. All of these acts were charged as having occurred in January and February, 1911, on the defendant's railroad while it was being used and operated in moving interstate traffic. The plea interposed was the general issue.

The case was tried twice. The first trial resulted in a judgment for the Government which was reversed by the Circuit Court of Appeals. 197 Fed. Rep. 287. At the second trial there was a directed verdict for the defendant and the judgment thereon was affirmed by that court. 212 Fed. Rep. 853. This writ of error challenges the judgment of affirmance.

There was no real conflict in the evidence, the material facts being as follows: The defendant operates an interstate railroad extending from New York City via New Jersey to Buffalo and Chicago. In that connection it maintains railroad yards, with docks for ferries and floats, on the west bank of the Hudson River, at Jersey City and Weehawken, where cars are received from and forwarded to various points around New York Harbor; and it maintains another yard at Bergen—inland two miles from Jersey City and three and one-half miles from Weehawken—where cars are received from and forwarded to western points. In the Jersey City yard there are 60 tracks, in the Weehawken yard 80 and in the Bergen

yard 115. Between the Bergen yard and the others is a hill about 250 feet high, which is pierced by a tunnel almost a mile in length. The three yards are connected by double tracks extending from Jersey City and Weehawken to the eastern portal of the tunnel and then passing through the tunnel to Bergen. The situation may be illustrated by treating the three yards as located at the outer points of the letter Y—Weehawken and Jersey City at the upper points and Bergen at the base—and connected by tracks conforming to the lines of that letter, the tunnel being along part of the lower line. The connecting tracks are not used by passenger trains but are the main tracks over which freight is moved from and to points around New York Harbor. Jersey City, Weehawken and Bergen are all stations at which freight, both local and interstate, is accepted and delivered, and are so shown in the defendant's tariff schedules. While the yards at these places are all used for receiving, storing, handling and forwarding cars, the work of classifying, distributing and assembling the cars preparatory to sending them to their ultimate destinations, west and east, is principally done in the Bergen yard. Most of the regular west-bound freight trains are made up and started in that yard and most of the regular east-bound freight trains are stopped and broken up there. Some regular trains carrying high-class freight pass Bergen without more than a temporary stop, but the greater part of the traffic is moved between the yards at Jersey City and Weehawken and the one at Bergen in transfer trains which only run between those yards and are operated over the double tracks before described. These transfer trains usually have about twenty-five cars, do not carry a caboose, are drawn and operated by engines and crews specially engaged in that service, and have flags and signal lights differing somewhat from those on other trains but answering the same purpose. They are not

run according to fixed schedules but at irregular intervals under the orders of yard masters and according to block signals. Their speed is from seven to eighteen miles an hour and they move great numbers of cars in each direction every day. All go through the tunnel, which is admitted to be very dark, and upon each trip they pass over several switches leading to other tracks, traverse part of the same line over which fifteen regular through and local freight trains are moved each day, and cross at grade tracks which are in daily use by approximately thirty-five passenger trains.

The cars named in the first eight counts of the declaration were defective in the particulars charged and while thus defective were hauled—six from Jersey City to Bergen and two from Weehawken to Bergen—in transfer trains along with other cars in commercial use. All of the defects were discovered in the yards from which the cars were moved and those in six of the cars could have been readily repaired in those yards by the local force of car repairers, consisting of seven men at Jersey City and five at Weehawken. The defects in two of the cars were serious and as to them Bergen may have been the nearest available point for making the necessary repairs. These cars were hauled by means of chains instead of draw-bars and there was no claim that they contained live stock or perishable freight.

The transfer trains named in the remaining eighteen counts were hauled—nine from Jersey City to Bergen, two from Weehawken to Bergen, one from Bergen to Jersey City and six from Bergen to Weehawken—without the requisite number of air brakes being in use or connected for use. On fourteen of these trains there was no attempt to connect any of the air brakes and on the remaining four less than 55 per cent. were connected. Brakemen were required to be on the cars and in some instances rode on the tops of box cars pursuant to a rule

of the defendant. No cars were switched out of or into these trains while they were on the way from one yard to the other.

The Circuit Court of Appeals rested its judgment upon the conclusions (a) that the three yards are not separate or distinct, but with the connecting tracks constitute a single and extensive yard, (b) that the movements of the transfer trains from Jersey City and Weehawken to Bergen and *vice versa* were mere switching operations and therefore not within the air-brake provision in the statute, and (c) that it was permissible under the statute to haul the cars with defective equipment in the circumstances disclosed.

We cannot assent to the view that the yards at Jersey City, Weehawken and Bergen are but a single yard. They doubtless are important accessories to the defendant's eastern terminal, but that does not make them one yard. They lie from two to three and one-half miles apart, are not so linked together that cars may be moved from one to another with the freedom which is usual and essential in intra-yard movements, and are in actual practice treated as separate yards.

The original Safety Appliance Act is entitled "An Act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes. The first section makes it unlawful, among other things, for a railroad company engaged in interstate commerce "to run any train" in such commerce without having a sufficient number of the cars so equipped with train brakes—commonly spoken of as air brakes—that the engineer on the locomotive can control the speed of the train "without requiring brakemen to use the common hand brake for that purpose." The second section pro-

hibits such a carrier from hauling or using on its line in moving interstate traffic any car not equipped with couplers which can be coupled and uncoupled automatically "without the necessity of men going between the ends of the cars;" and the fourth section forbids the use in interstate commerce of any car not provided with secure grab irons or handholds in the ends and sides of the car "for greater security to men in coupling and uncoupling cars." The sixth section imposes for every violation of the act a penalty of $100, to be recovered by suit. The act of 1903, by its first section, provides that the requirements of the original act respecting train brakes, automatic couplers and grab irons shall be held to apply to "all trains" and cars "used on any railroad engaged in interstate commerce," unless falling within a minor exception without bearing here. By its second section this act requires that not less than 50 per cent. of the cars in a train shall have their train brakes used and operated by the engineer on the locomotive, confers upon the Interstate Commerce Commission authority to increase this minimum percentage to the end that the objects intended may be more fully accomplished, and makes the penal provision before named applicable to violations of the requirement as enlarged by the Commission. By an order promulgated June 6, 1910, and becoming effective September 1, following, the Commission increased the minimum number of cars whose train brakes must be under the engineer's control to 85 per cent.

It will be perceived that the air-brake provision deals with running a train, while the other requirements relate to hauling or using a car. In one a train is the unit and in the other a car. As the context shows, a train in the sense intended consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the

air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo Ry.*, 205 U. S. 1; *S. C.*, 220 U. S. 590; *St. Louis, I. Mtn. &c. Railway* v. *Taylor*, 210 U. S. 281; *Chi., B. & Q. Ry.* v. *United States*, 220 U. S. 559; *Delk* v. *St. Louis &c. R. R., Id.*, 580; *Southern Railway* v. *United States*, 222 U. S. 20, 22; *Chicago &c. Ry.* v. *King, Id.*, 222; *Southern Railway* v. *Crockett*, 234 U. S. 725; *Minn. &. St. Paul Ry.* v. *Popplar, ante*, p. 369.

We are persuaded that the transfer trains moving from Jersey City and Weehawken to Bergen and *vice versa* came within the purview of the air-brake provision. They were made up in yards like other trains and then proceeded to their destinations over main-line tracks used by other freight trains, both through and local. They were not moving cars about in a yard or on tracks set apart for switching operations, but were engaged in main-line transportation, and this in circumstances where they had to pass through a dark tunnel, over switches leading to other tracks and across passenger tracks whereon trains were frequently moving. Thus it is plain that, in common with other trains using the same main-line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements. The original act prescribed that these appliances should consist of air brakes controlled by the engineer on the locomotive, and the act of 1903 declared that this requirement should

"be held to apply to all trains." We therefore conclude and hold that it embraced these transfer trains. Its applicability to this class of trains was considered and sustained in *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 198 Fed. Rep. 637; *United States* v. *Grand Trunk Ry.*, 203 Fed. Rep. 775; *United States* v. *Pere Marquette Railroad*, 211 Fed. Rep. 220; and *La Mere* v. *Railway Transfer Co.*, 125 Minnesota, 159.

The hauling of the cars with defective equipment was clearly in contravention of the statute. While § 4 of the act of 1910 permits such cars to be hauled, without liability for the statutory penalty, from the place where the defects are discovered to the nearest available point for making repairs, it distinctly excludes from this permission all cars which can be repaired at the place where they are found to be defective, and also declares that nothing therein shall be construed to permit the hauling of defective cars "by means of chains instead of drawbars" in association with other cars in commercial use, unless the defective cars "contain livestock or 'perishable freight.'" Six of the cars that were hauled while their equipment was defective could have been readily repaired at the place where the defects were discovered, which was before the hauling began. The remaining two were hauled by means of chains instead of drawbars in association with other cars in commercial use, and it is not claimed that they contained livestock or perishable freight.

It follows that the District Court erred in directing a verdict for the defendant and the Circuit Court of Appeals erred in sustaining that ruling. The judgments of both courts must therefore be reversed and the case remanded to the District Court for a new trial.

It is so ordered.